(17,759.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No 279.

S. A. AND S. C. HASELTINE, PLAINTIFFS IN ERROR,

vs.

THE CENTRAL NATIONAL BANK OF SPRINGFIELD, MISSOURI.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

INDEX.

	Original.	Print.
Writ of error	1	1
Citation	2	2
Assignment of errors	3	2
Certified copy of judgment of circuit court and order granting appeal	5	4
Motion to transfer to court in banc	7	6
Order overruling motion to transfer to court in banc	9	7
Cause argued and submitted	9	7
Abstract of record	10	8
Petition	10	8
Answer	13	10
Judgment of circuit court	14	10
Motion for new trial	15	11
Appeal granted	16	11
Appeal bond filed	16	12
Bill of exceptions	17	12
Referee's report	18	12
Defendant's instruction asked	20	13

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 18, 1900.

	Original.	Print
Motion for new trial	20	14
Motion for new trial overruled	21	14
Bill of exceptions signed	21	14
Judgment of supreme court	21	14
Opinion	22	15
Motion for rehearing filed	31	20
Motion for rehearing	31	20
Suggestions in support of motion	35	22
Motion for rehearing overruled	39	24
Writ of error allowed	39	24
Assignment of errors	40	25
Obligation for costs	41	26
Clerk's certificate	43	27

1 UNITED STATES OF AMERICA, *sct:*

The President of the United States of America to the judges of the supreme court of Missouri, division No. 1, Greeting:

Because in the records and proceedings, and also in the rendition of the judgment of a plea which is in the said supreme court, before you, between S. A. and S. C. Haseltine and The Central National Bank of Springfield, Missouri, a manifest error hath happened, to the great damage of the said S. A. and S. C. Haseltine, as by their complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington, D. C., not exceeding thirty days from the date of signing the citation, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court. Issued at office, in Springfield, this 19th day of March, A. D. 1900.

{ Seal of the United States Circuit Court, Southern Division of the Western Judicial District of Missouri. }

SARAH A. LATHIM, *Clerk*,
By REUBEN Y. THOMSON,
Deputy Clerk.

Allowed.
THEO. BRACE,
P. Judge, Division No. 1, Supreme Court of Missouri.

[Endorsed:] #8867. United States circuit court, southern division of the western district of Missouri. Haseltine *et al. vs.* The Central National Bank. Writ of error. Filed Apr. 5, 1900. Jno. R. Green, clerk.

SOUTHERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI, *sct:*

I do hereby return due and perfect obedience to the within writ, and do herewith, under the seal of said supreme court, distinctly and openly, send the record and proceedings aforesaid, with all things concerning the same.

Witness my hand as clerk and the seal of said court.
Done at office, in Jefferson City, this 16th day of April, 1900.

[Seal of the Supreme Court of Missouri.]

JNO. R. GREEN, *Clerk*,
By —— ——, *Deputy Clerk.*

2 UNITED STATES OF AMERICA, *sct:*

To the Central National Bank of Springfield, Missouri, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington, D. C., thirty days from and after the day this citation bears date, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern division of the western district of Missouri and filed in the office of the clerk of the supreme court of Missouri, wherein S. A. Haseltine *et al.* are plaintiff- in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff- in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Theodore Brace, judge of the supreme court of the State of Missouri, this fifth day of April, in the year of our Lord one thousand nine hundred.

THEO. BRACE, *Judge.*

[Endorsed:] # 8867. United States circuit court, southern division of the western district of Missouri. Haseltine *et al. vs.* The Central National Bank. Citation.

UNITED STATES OF AMERICA, }
Western District of Missouri, } *ss:*

I hereby acknowledge due service of the within citation this seventh day of April, A. D. 1900.

MASSEY & TATLOW,
Attorney- for Defendant in Error.

3 In the Supreme Court of the United States, October Term, 1900.

S. H. & S. C. HASELTINE, Appel-ants in Error,
vs.
THE CENTRAL NATIONAL BANK, Respondent in Error.

Assignment of Error and Prayer for Reversal.

Now come appellants in error and state to your honor that error- have been committed by the supreme court of Missouri against the rights of your appellants in the decision against appellants, in this:

I.

Appellants were entitled to the rights they claim in this petition under section 5198 of the Revised Statutes of the United States in 1878, which is denied by the decision in this case by the supreme court of Missouri.

II.

Also said decision of the supreme court of Missouri denies to appellants their claim under the laws of the United States as construed

by the Supreme Court of the United States in care of Brown *vs.* Marion National Bank, 169 U. S., 416.

III.

The supreme court of Missouri denies the rights to the appellants under the United States statute, section 5198, as construed by every court of last resort in the United States, some of which are:

See Nebraska First National Bank *vs.* Smith, 54 N. W. Rep., 254.

See in Pennsylvania, A. Brown *vs.* Second National Bank, 72 Pa., 209.

See in New Jersey, National Bank *vs.* Carpenter, 19 Atlantic Rep., 181.

See in West Virginia, Lynch *vs.* Bank, 2 W. Va., 994.

See in Kentucky, Henderson National Bank *vs.* Alver, 15 S. W., 132.

See in Texas, Stout *vs.* Ennis National Bank, 69 Texas, 384; 8 S. W. Rep., 808.

See in Nebraska, Exeter National Bank *vs.* Orchard, 61 N. W. Rep., 833.

4 See in Pennsylvania, Lebanon National Bank *vs.* Karmany, 98 Pa. St., 65.

Also U. S. Supreme Court, Brown *vs.* Marion National Bank, 169 U. S., 416.

Appellants, being thus deprived of their rights, ask that this case be reversed and appellants be entitled to their rights under the United States Statutes.

S. H. HASELTINE &
GEO. S. RATHBUN.

[Endorsed:] # 8867. In the Supreme Court of the U. S. S. A. & S. C. Haseltine, appellants in error, *vs.* The Central National Bank, def't in error. Assignment of errors & prayer for reversal. Filed Apr. 5, 1900. Jno. R. Green, clerk. Rathbun & Haseltine, att'ys for appellants.

5 STATE OF MISSOURI, *set:*

Be it remembered that heretofore, to wit, on the 5th day of August, 1897, there was filed in the office of the supreme court of the State of Missouri a certified copy of the judgment and order granting an appeal in a certain cause wherein S. A. Haseltine *et al.* were respondents and The Central National Bank of Springfield, Mo., was appellant; which said certified copy of the judgment and order granting an appeal is in words and figures as follows, viz:

Circuit Court, Greene County, January Term, 1897.

42nd Judicial Day, Saturday, March 13th, 1897.

S. A. HASELTINE and S. C. HASELTINE, Plaintiffs, *vs.* THE CENTRAL NATIONAL BANK OF SPRINGFIELD, Mo., a Corporation, Defendants. } Usury. Trial by Court. Judgment for Plaintiff for $831.70.

Now, at this day, come the above parties, plaintiffs and defendants, by their respective attorneys, and this cause coming on to be heard, the said parties announce ready for trial. Thereupon, issue being joined and a jury waived by consent, this cause is submitted to the court for hearing, and the court proceeds to hear the evidence, and, being sufficiently advised in the premises, the court finds the issues in favor of the plaintiffs, and this being an action for usurious interest received by defendants from plaintiffs, whereby the plaintiffs' demand is ascertained, and the court doth assess the amount due and owing from the defendant to the plaintiffs by reason of such usury at the sum of eight hundred and thirty-one dollars and seventy cents ($831.70).

It is therefore considered, adjudged, and ordered by the court that the plaintiffs, S. A. Haseltine and S. C. Haseltine, have and recover of and from the defendant, The Central National Bank of Springfield, Missouri, a corporation, the sum of eight hundred and thirty-one dollars and seventy cents ($831.70), as aforesaid, assessed by the court, with interest thereon, at the rate of eight per cent (8%) per annum, from this date until paid, together with all costs in this behalf laid out and expended for which execution may issue.

6

STATE OF MISSOURI, } *ss:*
County of Greene, }

I, J. M. Yarbrough, clerk of the circuit court within and for the county and State aforesaid, do hereby certify that the above and foregoing is a full, true, and complete copy of the judgment rendered by our Greene county circuit court on the 19th day of March, 1897, same being the 42nd judicial day of the January term thereon, as fully as same appears of record in my office.

In testimony whereof I have hereunto set my hand as clerk of the circuit court and affixed the seal thereof. Done at office, in the city of Springfield, Missouri, this 28th day of July, A. D. 1897.

[SEAL.]

J. M. YARBROUGH, *Cir. Clerk.*

Circuit Court, Greene County, January Term, 1897.

53rd Judicial Day, Saturday, March 27th, 1897.

S. A. & S. C. HASELTINE, Plaintiffs, vs. CENTRAL NATIONAL BANK, Defendant.	Usury. Affidavit for Appeal Filed. Appeal Granted to Supreme Court. Appellant Given until 1st Day of Next Term to File Bill of Ex.

Now, at this day, comes the above defendant, by Attorneys Massey & Tatlow, and files herein its affidavit praying for an appeal from the judgment heretofore rendered herein, and the same being by the court now seen, it is ordered that the appeal be, and is hereby, granted to the supreme court.

It is further ordered that the said *plaintiffs* appellants file herein its bill of exceptions in the above cause on or before the first day of the next term of this court.

STATE OF MISSOURI, } ss:
County of Greene, }

I, J. M. Yarbrough, clerk of the circuit court within and
7 for the county and State aforesaid, do hereby certify that the above and foregoing is a full, true, and complete copy of the order granting an appeal to the supreme court of the above-entitled cause on the 27th day of March, 1897, same being the 53rd judicial day of said term, 1897, as fully as the same appears of record in my office.

I- testimony whereof I have hereunto set my hand as clerk of the circuit court and affixed the seal thereof. Done at
[SEAL.] office, in the city of Springfield, Missouri, this 28th day of July, A. D. 1897

J. M. YARBROUGH, *Cir. Clerk.*

And afterwards, to wit, on the 30th day of November, 1897, the following proceedings were had in said cause, viz:

S. A. & S. C. HASELTINE, Resp., vs. CENT. NAT. BK., App.

Come now the said respondents, by attorney, and file their motion to transfer this cause to the St. Louis court of appeals.

Which said motion is in words and figures as follows, to wit:

In the Supreme Court, —— Term, 1897.

S. A. and S. C. HASELTINE, Respondents,
against
THE CENTRAL NATIONAL BANK, a Corporation, Appellant. } Case No. —.

Appeal from Greene Co. ct. ct., Jan'y term, 1897.

To the above-named appellant and Massey and Tatlow, its att'ys of record:

You are notified that respondents will, on Wednesday, Dec. 1st, 1897, file in said cause in said supreme court their motion asking that said cause be transferred to the Saint Louis court of
8 appeals for the reasons as set forth in said motion, and will request the court to act thereon without delay.

S. A. & S. C. HASELTINE,
Respondents pro Se.

Rec'd a copy of within notice and motion to transfer cause to St. Louis court of appeals this 29th Nov., 1897.

MASSEY & TATLOW,
Att'ys for Appellant.

In the Supreme Court, —— Term, 1897.

S. A. and S. C. HASELTINE, Respondents,
against
THE CENTRAL NATIONAL BANK, a Corporation, Appellant. } Case No. —.

Appeal from the circuit court of Greene Co., Mo., Jan'y term, 1897.

Now, at this day, come the respondents in the above cause and move the court to order a transfer of said cause to the Saint Louis court of appeals, and to direct its clerk to forward the transcript therein, with the order of transfer, to the clerk of said court of appeals, as provided by section 3300 of the Revised Statutes of the State of Missouri (1889), for the following reasons:

1st. Said appeal is improperly taken to said supreme court, and should have been taken to said St. Louis appellate court, which has jurisdiction of the cause.

The amount involved being less than 2,500.00 dollars.

2nd. Nor do the questions at issue, being one of usury, involve the validity of our United States statute or the construction of the constitution of this State or of the United States.

Wherefore respondents, plaintiffs below, ask that said cause be transferred, as aforesaid.

S. A. AND S. C. HASELTINE,
Respondents pro Se.

9 And afterwards, to wit, on the 23rd day of December, 1897, the further following proceedings were had in said cause, viz:

S. A. HASELTINE ET AL., Resp.,
v.
CENTRAL NAT. BK., App.

Now, at this day, the court, having fully considered and understood the motion heretofore filed to transfer this cause to the St. Louis court of appeals, doth order that said motion be, and the same is hereby, overruled.

And afterwards, to wit, on the 10th day of October, 1899, the further following proceedings were had in said cause, viz:

S. A. HASELTINE ET AL., Resp.,
vs.
CENTRAL NAT. BK., App.

Now, at this day, it is ordered by the court that this cause be set with No. 9037, January 13, 1900.

And afterwards, to wit, on the 13th day of January, 1900, the further following proceedings were had in said cause, viz:

CENT. NAT. BK., Resp.,
vs.
S. A. HASELTINE ET AL., App. } 9037.

S. A. HASELTINE ET AL., Resp.,
vs.
CENTRAL NAT. BK., App. } 8867.

Come now the said parties, by attorneys, and, after argument herein, submit these causes to the court.

And on the same day the following abstract of record in this cause was filed, to wit:

10 In the Supreme Court of Missouri, January Term, 1900.

S. A. HASELTINE ET AL., Respondent-.
vs.
CENTRAL NATIONAL BANK, Appellant. } No. 8867.

Abstract of Record and Brief of Appellant.

Appeal from Greene county circuit court.

Pleas before the circuit court of Greene county, at the January term, 1897, before the Honorable James T. Neville, judge of the twenty-third judicial circuit of the State of Missouri.

Petition.

S. A. HASELTINE and S. C. HASELTINE, Plaintiffs,
vs.
THE CENTRAL NATIONAL BANK OF SPRINGFIELD, MISSOURI, Defendant.

Now come plaintiffs and say that the defendant is a banking association or corporation duly organized and doing business as a corporation under the name and style of The Central National Bank by and under authority of the laws of the United States and located at Springfield, Greene county, Missouri.

That said association is indebted to and owes the plaintiffs the sum of $834.00 for and being twice the amount of usurious interest paid by the plaintiffs to said defendant and knowingly re-
11 ceived by said defendant as interest or discount in advance on a note and renewed notes, as hereinafter specified, at a greater rate of interest than allowed by the laws of the State of Missouri and in violation of the provisions of section- 5197 and 5198 of the national bank act, Revised Statutes of the United States.

The particulars of which are as follows, to wit:

Plaintiff- states that on the 25th day of June, 1894, plaintiffs made a note to the defendant for the use of the sum of $2,240 for 60 days' time, with S. I. Haseltine and L. K. Haseltine as security, on which plaintiffs paid usurious discount or interest in advance, and defendant knowingly and usuriously took and received the same in the amount of $39.35, which is 10 per cent. interest on the said sum for the said time, a greater rate of interest than is or was allowed by the laws of the State of Missouri, and in violation of the laws of the United States; and, further, that in an extension of the said loan on which said usurious interest was so paid by the plaintiffs and received by the defendant on the 29th day of October, 1894, the plaintiffs paid the defendant $46.30 for the extension of said note for a further period of 90 days, which usurious interest — knowingly and usuriously received by the defendant in violation of the laws of the United States, by reason of which the defendant became indebted to and owes the plaintiffs twice the said amount of discount so paid as

aforesaid, which amounts to $92.60, for which plaintiffs ask judgment.

Plaintiffs state that on the 30th day of January, A. D. 1895, the plaintiffs made a note to the defendant for the use of the sum of $2,240, with S. I. Haseltine and L. K. Haseltine as securities, for the period of sixty (60) days, on which plaintiffs paid a discount or interest in advance, and the defendant knowingly and usuriously took and received the same, amounting to $39.35, which is ten per cent.
12 interest a greater rate of interest than is or was then allowed by the laws of the State of Missouri, and is in violation of the laws of the State of Missouri and of the United States; by reason of which the defendant became indebted to and owes the plaintiffs twice the said amount of the said interest or discount so paid, as aforesaid, which amounts to $78.70, for which the plaintiffs ask judgment.

Plaintiffs further state that they made renewal of the said note to the said defendant association for the said sum of $2,240, on which plaintiffs paid discount or interest in advance, and defendant knowingly and usuriously took and received the same on the dates for the periods of time on said amount as follows, to wit:

On April 17th, 1895, on the said sum of $2,240 extended for — (60) days' time, for which plaintiffs paid interest or discount in the sum of $39.20, which the defendant knowingly and usuriously received, by which said defendant became indebted to the plaintiffs in the sum of $78.40, for which plaintiffs ask judgment.

Also, further, on the 5th day of June, 1895, on the said sum of $2,240, for the period of sixty (60) days, plaintiffs paid discount and defendant knowingly and usuriously received and took the sum of $39.20, by which defendant owes the plaintiffs the sum of $78.40, for which plaintiffs ask judgment.

Also, further, on the 7th day of August, 1895, on the said sum of $2,240, for the period of (60) sixty days, plaintiffs paid discount and defendant knowingly and usuriously received the sum of $39.20, by reason of which the defendant owes the plaintiffs the sum of $78.40, for which plaintiffs ask judgment.

Also, further, on the 9th day of October, 1895, on said sum
13 of $2,240, for the period of sixty (60) days, plaintiffs paid discount and defendant knowingly and usuriously received the sum of $39.20, by reason of which the defendant owes the plaintiffs the sum of $78.40, for which plaintiffs ask judgment.

Also, further, on the 11th day of December, 1895, on the said sum of $2,240, for the period of ninety (90) days, plaintiffs paid discount and defendant knowingly and usuriously received the same in the sum of $57.85, by reason of which the defendant owes the plaintiffs the sum of $115.70, for which plaintiffs ask judgment.

And also on the 14th day of June, 1896, on the said sum of $2,240, for the period of ninety (90) days, plaintiffs paid discount and defendant knowingly and usuriously received the sum of $57.85, by reason of which the defendant owes the plaintiffs the sum of $115.70, for which plaintiffs ask judgment.

Wherefore, by reason of the premises, the defendant is indebted to

and owes the plaintiffs the sum of $864.00, eight hundred and sixty-four dollars, for which amount the plaintiffs ask judgment and costs.

Which said petition was filed in the office of the clerk of the circuit court of Greene county, Mo., on the 15th day of October, 1896.

Answer.

And afterwards, to wit, on the 12th day of January, 1897, being the 6th day of January term, 1897, of said court, defendant filed herein an answer, which is in words and figures as follows:

(Cause entitled as above.)

"Comes now the defendant and, answering said petition, *and* admits that it is a corporation, as alleged in said petition, and that it is true, as alleged in said petition, that the plaintiffs executed
14 said note, but deny each and every other allegation in said petition contained."

And on the 28th day of January, 1897, being the 20th day of said term, the following proceedings were had in said cause:

(Omitting caption.)

"Now, at this day, comes plaintiffs in above cause, by attorney, and file herein their motion praying the court to advance the above cause on the docket and refer the same to a referee for hearing."

And afterwards, on the 6th day of February, 1897, the 24th day of said term, the following proceedings were had in said cause:

(Caption omitted.)

"Now, at this day, by order of the court, C. W. Hamlin is hereby appointed referee in the above cause to hear and determine all the issues in above cause, as per instructions of the court."

And afterwards, on the 12th day of February, 1897, being the 29th day of said term, the following other proceedings were had in said cause:

(Caption omitted.)

"Now, at this day, comes C. W. Hamlin, referee in above cause, and files herein his report, as such referee, in above cause."

Judgment.

And on the 13th day of March, 1897, being the 42nd day of said term, the following judgment was rendered in said cause, as follows:

"Now, at this day, comes the above parties, plaintiffs and defendant, by their respective attorneys, and, this cause coming on to be heard, the said parties announced ready for trial; thereupon,
15 issue being joined and a jury waived by consent, this cause is submitted to the court for hearing, and the court proceeds

to hear the evidence, and, being sufficiently advised in the premises, the court finds the issues in favor of the plaintiffs, and this being an action for usurious interest secured by the defendant from the plaintiffs, whereby the plaintiffs' demands is ascertained, the court doth assess the amounts due and owing from the defendant to the plaintiffs by reason of said usury at the sum of $831.70. It is therefore considered, adjudged, and ordered by the court that the plaintiffs, S. A. Haseltine and S. C. Haseltine, have and recover of and from the defendant, The Central National Bank of Springfield, Missouri, a corporation, the sum of eight hundred and thirty-one $\frac{70}{100}$ ($831.70) dollars, as aforesaid, assessed by the court, with interest thereon, at the rate of eight (8) per cent. per annum, from date until paid, together with all costs in this behalf laid out and expenced, for which execution may issue."

Motion for New Trial.

And afterwards, to wit, on the 10th day of March, 1897, the same being the 45th day of said January term, the following further proceedings were had in said cause:

(Omitting caption.)

"Now, at this day, comes the defendant, by attorney, and files herein a motion praying the court to set aside the judgment heretofore rendered in the above-entitled cause and grant a new trial of said cause."

And afterwards, to wit, on the 20th day of March, 1897, the same being the 47th day of said January term, the following further proceedings were had in the same cause:

(Caption omitted.)

16 "Now, at this day, comes on to — heard the motion heretofore filed herein by defendant praying the court to set aside the judgment heretofore rendered herein and grant it a new trial. Wherefore, all and singular the same being now seen and heard and fully understood, the court doth overrule said motion in above cause."

Appeal Granted.

And afterwards, on the 27th day of March, 1897, the same being the 53rd day of January term, 1897, the following other proceedings were had in said cause:

(Caption omitted.)

"Now, at this day, the application and affidavit in support thereof, heretofore filed herein by the defendant, praying the court to grant an appeal in the above-entitled cause, coming on for hearing and all and singular the premises being seen, heard, and fully understood, the court doth hereby sustain said application and grants said appeal to the supreme court of the State of Missouri."

Appeal Bond Filed.

And afterwards, to wit, on the 27th day of March, 1897, the same being the 53rd day of the said January term, 1897, the following other proceedings were had in the above-entitled cause:

"Now, at this day, comes the above defendant, by attorney, and files herein its bond in appeal in the above-entitled cause in the sum of seventeen hundred dollars, said bond being signed by the Central national bank, by Geo. M. Jones, president, as principal, and Geo. M. Jones and Geo. D. McDaniel, as sureties thereon. Wherefore, the same being now seen and examined and found to be good
17 and sufficient, it is hereby by the order of the court approved."

Bill of Exceptions.

And afterwards, to wit, on the 5th day of April, 1897, being the 56th day of said January term of said court, the following other proceedings were had in said cause:

"Now, at this day, comes the defendant herein, by attorney, and through the clerk presents to the court *their* bill of exceptions in the above-entitled cause, and the same, being now seen, examined, and found to be correct, is now signed and sealed by the judge of this court and made part of the record and proceedings in the court of the above cause."

And which bill of exceptions is in words and figures as follows:

In the Circuit Court of Greene County, January Term, 1897.

S. A. HASELTINE and S. C. HASELTINE, Plaintiffs,
vs.
CENTRAL NATIONAL BANK, Defendant.

Be it remembered that on this 13th day of March, 1897, the above-entitled cause coming on to be heard before the Hon. James T. Neville, judge of the twenty-third judicial circuit, both plaintiffs and defendant waiving a jury and consenting that said cause be tried before said judge without the intervention of a jury, and C. W. Hamlin, who was appointed as referee in this cause to find the facts upon the matters submitted to him by order of said court
18 making his appointment, submits and files in court his said report, which is in words and figures as follows, viz:

S. A. HASELTINE ET AL., Plaintiffs,
vs.
CENTRAL NATIONAL BANK, Defendant.

To the honorable circuit court of Greene county, Missouri:

I having been appointed referee in the above-entitled cause, to take testimony and make findings in accordance with the following instructions, to wit:

"The referee will ascertain how much cash was actually paid or

furnished to said plaintiffs or any of them by defendant bank of the said sum of $2,240 of the notes sued on.

"Second. How much interest was received or taken out of the various loans or discounts set out in defendant's answer and plaintiffs' petition, if any, at the time said respective loans were made.

"Third. How much interest of the items of interest or discount set out in defendant's answer and plaintiffs' petition was paid by the plaintiffs to said bank, not including amounts reserved out of said loans at the time the same were made.

"The referee will ascertain the entire amount of discount and interest severally charged by the bank in all of the extensions and consolidations and payments from the time of said loans down to and including the notes sued on.

"Fifth. The referee will find all the facts and report his
19 findings and all the evidence to the court."

I beg to submit the following report:

I find from the plaintiffs' petition that they are only asking judgment on account of moneys paid on October 29th, 1894, and subsequent to that time. Consequently I find that all of the moneys paid by defendant to plaintiffs were cash discounts paid at the time of the renewal of the note in controversy, which was admitted to be in excess of eight per cent. interest.

I find that on October 29th, 1894, plaintiffs paid defendant for the extension of the note in controversy for ninety days the sum of—

$46.30, Oct. 29, 1894, on $2,240 note for 90 days' extension.
$39.20, Jan. 30, 1895, on $2,240 note for 60 days' extension.
$39.20, Apr. 17, 1895, on $2,240 note for 60 days' extension.
$39.20, June 6, 1895, on $2,240 note for 60 days' extension.
$39.20, Oct. 9, 1895, on $2,240 note for 60 days' extension.
$57.85, Dec. 11, 1895, on $2,240 note for 90 days' extension.
$57.85, Mar. 13, 1896, on $2,240 note for 90 days' extension.
$57.85, June 14, 1896, on $2,240 note for 90 days' extension.

$415.85 being the amount of the total payments in cash in advance at the time of the several renewals of the $2,240 note.

I find that the note for $2,240 given by plaintiffs to defendant has not been paid.

The costs incurred before me in this case consist only of the charges of the stenographer, Miss Alice T. Barrett, whose bill is hereto attached and amounts to $3.25, and whatever may be taxed in favor of the referee, which he thinks is reasonable at the sum of $25.00. All of which is respectfully submitted, with the testi-
20 mony taken before me, for the consideration and action of the court.

(Signed) C. W. HAMLIN, *Referee.*

(As no objections were made by plaintiffs or defendants to the findings and report of referee, nor exceptions of any kind taken, the testimony submitted with his said report is omitted from bill of exceptions in this abstract of record.)

Defendant prayed the court to give the following instruction:

"It appearing from the evidence in this case that the defendant

bank has not received from the plaintiffs in all the amounts paid to *them* by the plaintiffs more than the sum loaned by the said bank to the plaintiffs, with legal interest thereon, plaintiffs cannot recover on this cause of action."

Which instruction the court refused to give; to which refusal of the instruction thus prayed the defendant, by its counsel, then and there excepted at the time.

Whereupon the court found for the plaintiffs in the sum of $831.70 and rendered judgment therefor.

And on the 17th day of March, 1897, and within four days after the rendering of said judgment, defendant filed *their* motion for a new trial, as follows:

Comes now the defendant and moves the court to set aside the judgment rendered in this cause and grant defendant a new trial—

Because upon the findings of the referee, to which no exceptions were taken, and the same being all the evidence submitted in this case, the judgment should have been for the defendant.

Because said judgment is against the law.

Because said judgment is against the evidence as found by said referee.

21 Because said judgment is against the law and the evidence.

Which said motion the court overruled on the — day of March, 1897; to which ruling and order of the court the defendant then and there duly excepted at the time.

And that the above matters and things and rulings and exceptions may be made part of the record defendants tender this their bill of exceptions and pray that the same may be signed and sealed as such, which is accordingly done.

This April 5th, 1897.

(Signed) JAMES T. NEVILLE, *Judge.*

And afterwards, to wit, on the 20th day of February, 1900, the further following proceedings were had in said cause, viz:

S. A. HASELTINE and S. C. HASELTINE, Respondents,
vs.
THE CENTRAL NATIONAL BANK OF SPRINGFIELD, MO., a Corporation, Appellant.

Appeal from Greene county circuit court.

Now, at this day, come again the parties aforesaid, by their respective attorneys, and the court here, being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Greene county circuit court rendered, be reversed, annulled, and for naught held and esteemed, and that the said appellant be restored to all things which it has lost by reason of the said judgment. It is further considered and adjudged by the court that the said cause be remanded to the said Greene county circuit court for further proceedings to be had therein, in conformity with the opinion of this court

22 herein delivered, and that the said appellant *delivered and that the said appellant* recover against the said respondents

its costs and charges herein expended and have therefor execution. (Opinion filed.)

Which said opinion is in words and figures as follows, to wit:

In the Supreme Court of Missouri, October Term, 1899, Division No. 1.

S. A. HASELTINE ET AL., Respondents,
vs.
CENTRAL NATIONAL BANK, Appellant. } No. 8867.

This case is the counterpart of the case of Central National Bank *vs.* Haseltine, just decided. It is an action under section 5198, R. S. U. S. 1878, to recover $831.70, that being double the amount of the usurious interest paid by the plaintiffs to the defendant on the note for $2,240, on which the defendant obtained judgment against the plaintiffs in the other case referred to. It is conceded that the plaintiffs paid the defendant the sum of $415.85 to procure extensions of the note for $2,240, from time to time, between October 29th, 1894, and June 14th, 1896. It is also conceded that such payments were for usurious interest, and that the defendant in accepting and receiving the usury has violated the Federal statute. The sole defense is that the party who has paid usurious interest cannot maintain an action, under that statute, to recover twice the amount so paid until he has paid the principal sum due, or, at least, unless he tenders the principals, and it is admitted that the plaintiffs have not done this.

In support of this contention the defendant relies upon Wheaton *v.* Hubbard, 20 Johns, 293; Hawkins *v.* Welch, 8 Mo., 490; Rutherford *v.* Williams, 42 Mo., 18; Livingston *v.* Burton, 43 M. A., 272, and McBroom *vs.* Scottish Investment Co., 153 U. S., 318.

In the New York case it was pointed out that the statute of that State permitted a borrower to recover the excess of interest over the legal rate paid in an action of debt if the suit was begun
23 within one year, and if the borrower did not sue within such year, then any other person could institute such an action within the second year, and one-half of the recovery went to the person suing and the other half to the poor of the town in which the offense was committed. It was also shown that at common law, under the statute of 12 Anne, ch. 16, "the party receiving more than the legal rate of interest forfeited the treble value of the moneys or things lent," to be recovered in an action for money had and received; "but the party injured cannot recover any part of the principal and legal interest, and to entitle him to maintain the action he must show that he has done all that equity requires. Bacon, Usury, G. I. Term Rep., 153." And it was held that the statutory remedy did not supersede the common-law remedy, but that the remedies were concurrent. The suit was not brought until more than two years after the offense was committed, and it was held that the action was under the common-law remedy, and that at common law the suit could not be maintained so long as the principal and legal in-

terest remained unpaid, but, as the defendant had not pleaded or proved that it had not been paid, it would be inferred that it had been paid.

Hawkins *v.* Welch, 8 Mo., 490, was an action to recover usurious interest paid, and Wheaton *v.* Hubbard, 20 Johns, 20, was followed. The whole of the principal had not been paid, and the court said: "And if the plaintiff now obtains a judgment against the defendant for $90 and collect that money from the said defendant, the plaintiff may himself become insolvent and be unable to pay the principal, or rather what remains of the principal."

Rutherford *v.* Williams, 42 Mo., 18, was a suit by a grantor against the *cestue que trust* in a deed of trust for the value of the prop-
24 erty sold under the deed of trust, less the debt secured thereby, which it was alleged had been fraudulently foreclosed. There was an allegation that usurious interest had been exacted. In the course of the opinion it was noted that usurious interest once paid could not be recovered (Ransom *v.* Hays, 39 Mo., 445), but it was held that equity would not aid a borrower except on condition that the principal and legal interest were paid.

Livingston *v.* Burton, 43 M. A., 272, was an injunction to restrain a sale of real estate under a mortgage and for a cancellation of the mortgage. The circuit court found that usurious interest had been paid which equalled the amount of the debt, and therefore cancelled the mortgage. The Kansas City court of appeals reversed that decree, and held that usurious interest once paid could not be recovered or applied in extinguishment of the principal, and that the plaintiff was not entitled to have the mortgage in question cancelled unless he offered to pay what is due on the principal debt, "leaving out of consideration the amount of usurious interest paid."

McBroom *v.* Scottish Investment Co., 153 U. S., 318, was an action under the statute of New Mexico by a borrower to recover double the amount alleged to have been paid by him to the lender as usurious interest. The statute of New Mexico in this regard is very much like the national banking act, except that the limitation is three years instead of two. The plaintiff borrowed of the defendant $65,000, evidenced by his notes maturing at stated times, and secured it by a mortgage on land, live stock, &c. For securing the loan the plaintiff paid the agent of the defendant $6,500, which the defendant knew of and afterwards received from the agent. The plaintiff paid one interest note and then quit paying, but at once sued the de-
fendant for $13,000, double the $6,500 so paid as usury. He
25 recovered judgment for that amount in the lower court, but on appeal the supreme court of New Mexico reversed the judgment below and held "that the borrower was not entitled to recover the statutory penalty while any portion of the amount really loaned, with legal interest, after crediting all payments, remained unsatisfied." The case then went to the Supreme Court of the United States, where Mr. Justice Harlan delivered the opinion of the court. After calling attention to the similarity between the statute of New Mexico and the national banking act, and holding that the

taking of usurious interest did not cut off a right to recover the sum actually loaned, he said:

"The contract of loan not being void, except as to the excess of interest stipulated to be paid, the question arises whether the lender is liable to an action for the penalty prescribed by the statute so long as the principal debt, with legal interest thereon, after deducting all payments, is unpaid. We are of opinion that this question must be answered in the negative. While under the statute the mere charging of usurious interest may be a misdemeanor for which the lender can be fined, whether such usurious interest is or is not collected or received, the borrower has no cause of action until usurious interest has been actually collected or received from him. Such is the mandate of the statute; and interest cannot be said to have been collected or received in excess of what may be lawfully collected and received until the lender has, in fact, after giving credit for all payments, collected or received more than the sum loaned, with legal interest. Such, in our judgment, is the true construction of the statute of New Mexico. In this view the limitation of three years within which the borrower may sue for double the amount of usurious interest collected and received from him does not commence to run, and therefore the cause of action does
26 not accrue until the lender has actually collected or received more than the original debt, with legal interest. These conclusions are supported by adjudged cases.

In Duncan *v.* First Nat. Bank of Mount Pleasant, in the district court of the United States for the western district of Pennsylvania, it was said: 'From the origin of the loan, from the retaining of the first discount through all the renewals up to the time of final payment of the principal or up to the time of entering judgment, there is *locus penitentiæ* for the party taking the excessive interest. Any time till then he may consider the excessive interest paid on account of the loan, and so apply it and lessen the principal. * * * Up to that time he may make this election. When payment is actually made or judgment entered the election is made, and if, as in these cases, judgment is entered for the face of the amount of the notes or full amount of the loan, or payment is taken in full without any reduction by taking out the excessive interest, the cause of action is complete.'

Thompson's National Bank Cases, 360, 362.

In Stevens *v.* Lincoln, 7 Met., 525, 528, which was an action under a statute of Massachusetts authorizing suit to recover threefold the amount of interest paid, it being alleged that interest had been paid at a greater rate than the law allowed, the court said: 'In regard to the payment of $1,458.91, whether this was a payment of the usurious interest or a part of it, we are of opinion that while the usurious interest is unpaid there remains the *locus penitentiæ*; that the party may relinquish it and recover for the balance of his debt, the contract not being rendered void by the statute; and in the absence of proof as to any appropriation of a partial payment the law will apply a payment to the valid demand rather

than to the illegal one, and the balance which remain-
27 unpaid, if it exceeds the usury agreed to be paid, includes the usury; so that, on one side, the debtor shall not recover back any part of that which he honestly owed by the allegation on his part that the payment made by him was the payment of the usury; nor, on the other hand, will the law permit the creditor to secure to himself the avails of his illegal contract, and when he sues for the balance due on the contract to aver that the usurious interest was contained in the previous payment, and that the residue is justly due.' The same rule was affirmed in Saunders *v.* Lambert, 7 Gray, 484, 486.

So in Harvey *v.* National Life Ins. Co., 60 Vermont, 209, 211: 'As the result of that transaction the plaintiff went away with nine hundred dollars in money, all he had ever received from the defendant as his own money, and the defendant with the plaintiff's note for $1,000. * * * Hence the one-hundred-dollar usury entered into and became a part of the mortgage note. The payment by the plaintiff and by Mrs. Hardaker, prior to the time of taking up the note, would in law be applied towards the payment of the legal portion of the note. * * * All the payments made by her, as well as those made by the plaintiff, up to the final payment, were in law to be applied towards the liquidation of the legal portion of the note. Hence the plaintiff is entitled to recover what was then legally due upon the note after applying the payments made thereon in liquidation of the legal portion of the note with interest.'

To the same effect are the following authorities: Kendall *v.* Crouch, 88 Kentucky, 199, 202; Smith *v.* Robinson, 10 Allen, 130, 132; Hawkins *v.* Welsh, 8 Missouri, 490, 492; Hall *v.* Fairfield Bank, 30 Nebraska, 99, 102; Jackson *v.* Garner, 79 Georgia, 415.

In Wright *v.* Laing, 3 B. & C., 165, 169, which was an action to recover the penalties of the statute of usury, Abbott, C. J., said:
28 'None of the payments were appropriated by either party at the times of payment. If the law ought now to make such an appropriation as the pleader has supposed in this court, the court will be sustained by the proof; otherwise not.

We think the law ought now to make such an appropriation; * * * and such an appropriation works no prejudice to the party; it leaves him only where by his own conduct he placed himself, and in the case I have put of the payment of one bill and non-payment of the other, if an action for the penalties of the statute should be brought, the same principle of law would protect the defendant by applying the payment of the first bill to the legal demand and not permitting the then plaintiff to apply it to the illegal demand—that is, to the loan and interest, although it be precisely of the same amount, because, peradventure, the lender might repent the illegal bargain and refuse the full amount of the second bill, and the law will allow him the opportunity of doing so, that he might not be deemed a receiver of usurious interest without clear evidence that he had not only bargained to receive, but had actually received such interest.

And if the law will make this appropriation of the payment in

the two cases that I have put, in the one instance against the lender, and to prevent him from enforcing an illegal bargain, and in the other instance in favor of the lender, and to protect him from being subject to a penalty for an illegal bargain only, it seems very plainly to follow that a similar appropriation ought to be made by law in the case before the court; * * * and this, in effect, is only saying that where a person has two demands, one recognized by law, the other arising on a matter forbidden by law, and an unappropriated payment is made to him, the law will afterwards ap-
29 propriate it to the demand which it acknowledges, and not to the demand which it prohibits.'

For the reasons stated, we are of opinion that this action cannot now be maintained under the statute, and consequently the court below properly reversed the judgment of the court of original jurisdiction and entered judgment in favor of the defendant.

It is proper to say that the questions determined in Barnett *v.* National Bank, 98 U. S., 555; Driesbach *v.* National Bank, 104 U. S., 52; Stephens *v.* Monongahala Bank, 111 U. S., 197, and Carter *v.* Carusi, 112 U. S., 478, do not arise here.

No question is presented in the case before us as to whether the borrower, when sued for the principal debt and legal interest, may or right set off the amount of any penalty prescribed by the statute of New Mexico.

The judgement of the supreme court of the Territory is therefore affirmed."

This must be taken as an authoritative interpretation of the meaning of section 5198, Rev. Stats. U. S. 1878, and, as that is a Federal statute, the construction thereof by the Supreme Court of the United States must be followed by this court. Under the rule there laid down, the plaintiffs herein are not entitled to maintain this action, for there is no allegation or proof that they have paid or offered to pay the debt actually due—that is, the amount actually received by the plaintiffs from the defendant.

It is contended, however, by the plaintiffs that the decision of the Supreme Court of the United States in Brown *v.* National Bank, 169 U. S., 416, establishes a different rule and authorizes a recovery in this case. This is a misapprehension.

Mr. Justice Harlan delivered the opinion in the McBroom
30 case and also in the Brown case, and in the Brown case he cites and reaffirms the McBroom case. In the Brown case it did not appear how much of the usurious interest had been paid and how much was included in the face of the note. It was argued, however, that including it in the face of the note was a payment, but the Supreme Court held that not to be the law. The rule is clearly laid down, however, that if usurious interest is included in the face of the note it should, in a suit on the note, be credited on the note or eliminated from the note, but no action could be maintained under section 5198 to recover it because it had not been actually paid, and that only usurious interest actually paid could be recovered under that section.

This is all that the Brown case decides. The question whether an

action for usurious interest actually paid could be maintained without allegation and proof that the debt itself had been paid or without an offer to pay it was not raised, discussed, or passed on in the Brown case, except so far as approving the McBroom case, which, so held, may be regarded as an inferential determination of that question, and, so regarded, it cuts off the plaintiffs' right to maintain this action.

Thus it will be seen that the Supreme Court of the United States puts the same construction upon the Federal statute that courts of equity and the courts of law, where the statute 12 Anne is in force, place upon the rights of the borrower and lender—that is, that courts will neither aid the lender to collect usurious interest promised to be paid nor will they aid the borrower to recover such usurious interest actually paid unless he has paid or offers to pay the amount of money actually received from the lender.

31 The judgment of the circuit court is therefore reversed and the cause remanded to be proceeded with in accordance herewith. All concur.

W. C. MARSHALL, *J.*

And afterwards, to wit, on the 1st day of March, 1900, the further following proceedings were had in said cause, viz:

S. A. HASELTINE ET AL., Respondents,
vs.
CENTRAL NATIONAL BANK, Appellant.

Come now the said respondents, by attorneys, and file their motion for rehearing herein.

Which said motion for rehearing is in words and figures as follows, to wit:

In the Supreme Court of Missouri, October Term, 1899.

S. A. HASELTINE ET AL., Pl'fs, Respondent-,
—
THE CENTRAL NATIONAL BANK, Appellant. } No. 8867.

Motion for Rehearing.

Now come respondents in the above-entitled case and ask this honorable court for a rehearing of the same:

I.

32 For the reason that the opinion rendered by this honorable court is in direct conflict with the leading, controlling, and only cases construing the U. S. statute upon which this suit is based, to some of which your honors were not referred, and others of which your honors makes no mention.

To wit: The supreme court of Pennsylvania, in 1872, by Judge Sharswood, in Brown *vs.* Second National Bank, 72 Pa. St., 209, and by the same court reaffirmed in the (98 Pa. St., 65) Lebanon National Bank *vs.* Karmay.

Also, the supreme court of Texas, in 1887, construed said section in the case of Stout *et al. vs.* Ennis National Bank, 69 Texas, —, in conflict with your honors' opinion, 8 S. W. Rep., 808, as also were the following cases: Also by the court of errors of New Jersey, in 1890, National Bank *vs.* Carpenter, 19 Atlantic Rep., 181; also Lynch *vs.* Bank, 22 W. Va., 994.

Also by the supreme court of Kentucky in Henderson National Bank *v.* Alver, 15 S. W., 132.

Also by the supreme court of Nebraska, in 1893, and again in 1895. (See First National Bank *vs.* Smith, 54 N. W. Rep., 254.) Also Exeter National Bank *vs.* Orchard, 61 N. W. Rep., 833.

In this last decision the supreme court of Nebraska says: "There is no case cited or to be found to the contrary." It was decided in 1895, a year after the McBroom case of New Mexico, on which your honors rely, which was decided March, 1894; and that court says: "There is no other reasonable construction of the section 5198."

Also a long line of cases to the same effect: 98 B. C., 244; 3 S. E. Rep., 484, etc.

33 This court has overlooked the leading fact in the case at bar, namely, that the usurious interest was demanded and paid in cash at the time of the several renewals of the notes.

2nd. And not being incorporated in the note, or deducted from the loan, as the $6,500 was from the $65,000 in the New Mexico case. See facts stated in 30 Pacific Rep., 859.

3rd. The New Mexico statute differed from the United States statute, section 5198, in not forfeiting the legal interest, but only the excess. Hence McBrown had paid no excess, hence no usury.

III.

Your honors' decision is against the United States Supreme Court decision in Brown *vs.* Marion National Bank, 169 U. S., 416.

IV.

The decision in this case is in direct conflict with section 5198 United States Statutes, which says that suit shall be begun within two years from the usurious transaction (not from payment of the principal debt).

V.

Said decision destroys the effect of the United States statute, or plaintiffs, respondents, would be barred by the statute of limitations against another suit.

VI.

This decision is in conflict with Brown *vs.* Marion National Bank, the last utterance of the Supreme Court of the United States construing section 5198 of the United States statute.

See 169 U. S. Rep., 416.

34 "If at any time the obligator actually pays usurious interest as such, the usurious transaction must be held to have

then and not before occurred, and he must sue within two years thereafter."

Can the plaintiff be debarred from a right to sue when his cause of action is not complete?

If your honor's decision is correct, the statute is an *an*nul-ity. In McBroom's case, the borrower gave his note for $65,000 and only received $58,500. That was a case of incorporating the usury in the note.

It differs from this case before you. See facts in the New Mexico, 30 Pacific Rep., 859. Here the interest was actually paid, and differs from the McBroom case.

The Brown and the McBroom cases, — by the Supreme Court of the U. S., do not conflict with each other or the State cases above referred to, but the Brown case shows the difference, in effect, between usury included in the note and money actually paid as usury. The latter gives the right of action under all the decisions.

VII.

Your honor has overlooked all the cases by the several supreme courts of other States construing section 5198, all of which are harmonious to the effect that the principal does not have to be paid before suit for usury actually paid, and the statute of limitation begins to run from the time of actual payment of the usury as such.

In Scotch Mortgage Company *vs.* McBroom, decided in the supreme court of New Mexico, it will be seen in 30 Pacific Reporter, 859, see page 861, that McBroom gave his note for $65,000, but only took with him $58,500.

That $6,500 was reserved or deducted from the note—not actually paid, as in the case of our renewals, where our note remained the same. We paid cash to get it extended from time to time.

The facts are different, and the law is decided to be different by all the courts, save and except the mistake your honor makes in the case at bar, should you not give a new hearing.

So in Brown *vs.* Marion National Bank, 169 U. S., 416, the Supreme Court of the United States says:

"If the note when sued on includes usurious interest or interest upon usurious interest agreed to be paid, the holder in due time may elect to remit such interest, and it cannot then be said that usurious interest was paid to him. McBroom against Investment Co., 153 U. S., 318."

"If at any time the obligee actually pays usurious interest as such, the usurious transaction must be held to have then, and not before, occurred, and he must sue within two years thereafter."

Thus the McBroom case, on which your honor relies, is clearly distinguished from the case at bar, and we must respectfully request this honorable court to grant a rehearing of the above-entitled case.

Very respectfully, RATHBUN & HASELTINE,

Attorney- for Respondent.

Argument.

36 The decision in this case is in direct conflict with every other decision on the United States statute, section 5198, that has been rendered in the various courts of last resort.

The court seems to have overlooked the decision of the supreme court of Pennsylvania construing section 5198 U. S. *In* Lebanon National Bank *vs.* Karmony, 98 Pa. St., 65, decided in 1881, expressly decides:

"Suit may be brought for the penalty, paying the usurious interest at any time after the said payment, even though the indebtedness on which the usurious interest was paid has not been discharged."

2nd. The court overlooked the case decided by the supreme court of Texas in 1887, construing section 5198 United States statutes. It says:

"The appellee insists that the right to the penalty could not attach until the entire debt was paid, and that until this occurred it had the power and the right to abandon its claim for the usurious interest, and thus defeat the appellant's right to the penalty."

The rule is this well stated by the supreme court of Massachusetts in the case of Stevens *vs.* Lincoln, 7 Metcalf, 528:

"While the usurious interest remains unpaid there remains the *locus penitentiæ*. Where, however, the parties, as they did in this case, appropriate the payment of usurious interest *locus penitentiæ* can no longer exist, for the offense has been consummated, the rates of interest has been paid, and the right to the penalty fixed."

3rd. The supreme court of Nebraska has construed this United States statute, section 5189, on same question twice.

In the 54 N. W. Rep., 254, case of First Nat. Bank *vs.* Smith, the supreme court in 1893 says:

37 "The question presented involves the true interpretation of the proviso clause of section 5198 of the Revised Statutes of the United States.

"It does not refer to the time the contract is entered into, nor is it the payment of the principal sum borrowed which gives the right to sue for the penalty. The receipt of the illegal interest is the foundation of the borrower's right to recover the penalty, and the actual payment of the interest in excess of the legal rate is the usurious transaction referred to in the section.

"The period of limitation begins to run from the time the cause of action accrues.

"If the interpretation for which plaintiff (appellants) contends should be adopted, then it would follow that a suit to recover the penalty for the taking of usurious interest by a national bank cannot be maintained until the loan is fully paid off.

"Stated differently, one who has paid large sums as illegal interest on a loan and is unable to pay the entire debt is not entitled to the benefit of the section.

"Such was not the intention of Congress, nor is it the fair and reasonable import of the language of the section.

"The right to maintain the action to recover the penalty prescribed by said section 5198 accrues as soon as the unlawful interest is paid, and the two years' limitations begin tor un from the time such payment was made." And cites a number of cases.

Brown *vs.* Second National Bank, 72 Pa. St., 209, Judge Sharswood, for the supreme court of Pennsylvania, in 1872, in
38 construing section 5198, United States statutes, says:

"It is actual payment on the foot of the usurious contract, either in part or in whole, which consummates the usury and from which the limitations of the action for the penalty commences to run."

This followed in 1890—

By the court of errors of New Jersey in National Bank *vs.* Carpenter, 19 Atlantic Reporter, 181; 5198, United States statutes: "The statutes of limitation begins to run from the time the interest is paid."

In Henderson *vs.* Second National Bank, Kentucky supreme court, 1891, section 15, S. W. Rep., 1321, says:

"United States statute, section 5198, gives a right within two years, and is: 'The date runs from the usurious transaction and not from payment of the note.'"

Same, Lynch *vs.* Bank, 22 W. Va., 554.

Say "the statute of limitations is two years from the payment of interest."

"Each payment of illegal interest must be regarded as a transaction, within the intent of the statute; and when the payment is made or actually occur- the two years' limitation begin- to run, as to that payment, from that time, and so on each successive payment or renewal of the same loan."

Very respectfully, RATHBUN & HASELTINE.

39 And afterwards, to wit, on the 14th day of March, 1900, the further following proceedings were had in said cause, viz:

S. A. HASELTINE ET AL., Resp.,
v.
CENT. NAT. B'K, App.

Now, at this day, the court having fully considered and understood the motions heretofore filed for rehearing herein, doth order that said motions be, and the same are hereby, overruled.

And afterwards, to wit, on the 5th day of April, 1900, the further following proceedings were had in said cause, viz:

S. A. HASELTINE ET AL., Respondents,
vs.
CENTRAL NATIONAL BANK, Appellant.

Now, at this day, there is presented to the Honorable Theodore Brace, presiding judge of division No. 1 of the supreme court of the State of Missouri, in chambers, a writ of error to the Supreme Court

of the United States, a citation directed to said appellant, citing and admonishing it to appear at a Supreme Court of the United States on the 5th day of May, 1900; an assignment of errors, and an obligation for costs; which said writ of error is allowed.

Which said assignment of errors is in words and figures as follows, to wit:

40 In the Supreme Court of the United States, October Term, 1900.

S. H. & S. C. HASELTINE, Appellants in Error,
vs.
THE CENTRAL NATIONAL BANK, Respondent in Error.

Assignment of Error and Prayer for Reversal.

Now come appellants in error and state to your honor that error have been committed by the supreme court of Missouri against the rights of your appellants in the decision against appellants, in this:

I.

Appellants were entitled to the rights they claim in this petition under section 5198 of the Revised Statutes of the United States in 1878, which is denied by the decision in this case by the supreme court of Missouri.

II.

Also said decision of the supreme court of Missouri denies to appellants their claim under the laws of the United States as construed by the Supreme Court of the United States in case of Brown *vs.* Marion National Bank, 169 U. S., 416.

III.

The supreme court of Missouri denies the rights to the appellants under the United States statute, section 5198, as construed by every court of last resort in the United States, some of which are:

See Nebraska First National Bank *vs.* Smith, 54 N. W. Rep., 254.

See, in Pennsylvania, A. Brown *vs.* Second National Bank, 72 Pa., 209.

41 See, in New Jersey, National Bank *vs.* Carpenter, 19 Atlantic R., 181.

See, in West Virginia, Lynch *vs.* Bank, 2 W. Va., 994.

See, in Kentucky, Henderson National Bank *v.* Alver, 15 S. W., 132.

See, in Texas, Stout *vs.* Ennis National Bank, 69 Texas, 83, 84, 88; W. R. P., 808.

See, in Nebraska, Exeter National Bank *v.* Orchard, 61 N. W. Rep., 833.

See, in Pennsylvania, Lebanon National Bank *vs.* Karmany, 98 Pa. St., 65.

Also U. S. Supreme Court, Brown *vs.* Marion National Bank, 169 U. S., 416.

Appellants, being thus deprived of their rights, ask that this case be reversed and appellants be entitled to their rights under the — United States.

S. H. HASELTINE &
GEO. S. RATHBUN*E*.

And which said bond is in words and figures as follows, to wit:

UNITED STATES OF AMERICA, } *sct:*
Western District of Missouri, }

In the Circuit Court of the United States for the Southern Division of said District.

S. A. & S. C. HASELTINE }
against
THE CENTRAL NATIONAL BANK. }

I enter myself surety for costs in said case and undertake and promise to pay all costs and fees which may accrue to the
42 defendant in this action, or to any officer of this court or other person entitled thereto, and in default of payment by the plaintiffs of any fees due or costs ordered or adjudged to be paid by them, I agree and stipulate that fee bill or execution may issue against my property for any costs taxed against the plaintiffs or for any fees due by them.

Witness my hand and seal this 19th day of March, A. D. 1900.

G. A. H. CLARKE. [SEAL.]

Executed and acknowledged before me this 19th day of March, A. D. 1900.

[SEAL.] SARAH A. LATHIM,
U. S. Clerk,
By REUBEN Y. THOMSON, *D. C.*

UNITED STATES OF AMERICA, *sct:*

I, G. A. H. Clarke, a citizen of the State of Missouri and obligor in the above undertaking, do solemnly swear that I am a resident of the county of Greene, in said State; that my post-office is in the town of Springfield therein; that I own real estate, over and above all my debts, liabilities, and exemptions under homestead and appraisement laws, to the amount of fifteen thousand and no / 100 dollars, subject to execution in the State of Missouri.

G. A. H. CLARKE.

Subscribed and sworn to before me this 19th day of March, A. D. 1900.

[SEAL.] SARAH A. LATHIM,
U. S. Cir. Court,
By REUBEN Y. THOMSON, *D. C.*

I certify that the above surety is, in my opinion, sufficient to secure the costs in said case.

GEO. S. RATHBUN,
S. A. HASELTINE,
Attorney-for Plaintiff-.

43 STATE OF MISSOURI, *sct:*

I, Jno. R. Green, clerk of the supreme court of the State of Missouri, certify that the foregoing is a full, true, and complete transcript of the record and proceedings in the cause entitled S. A. Haseltine *et al. vs.* Central National Bank, as fully and complete as the same appear- of record and on file in my said office.

In witness whereof I have hereunto set my hand as clerk and affixed the seal of said court. Done at office, in the city of Jefferson, this 16th day of April, A. D. 1900.

[Seal of the Supreme Court of Missouri.]

JNO. R. GREEN,
Clerk Supreme Court of Missouri.

Endorsed on cover: File No., 17,759. Missouri supreme court. Term No., 279. S. A. and S. C. Haseltine, plaintiffs in error, *vs.* The Central National Bank of Springfield, Missouri. Filed May 12th, 1900.

(17,759.)

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No 279.

S. A. AND S. C. HASELTINE, PLAINTIFFS IN ERROR,

vs.

THE CENTRAL NATIONAL BANK OF SPRINGFIELD, MISSOURI.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

INDEX.

Statement of the case, - - - - , Page 1
Argument of errors, - - - - - " 1
Brief, - - - - - - - " 3

STATEMENT OF CASE.

This is a suit under the National Banking Act, for the statutory penalty for knowingly *charging* and *receiving* usurious interest in violation of the *second clause* of section 5198 of the revised Statutes of the United States, Second Ed., 1878, p. 1005.

The petition contains several counts, aggregating $831.70, being double the amount of ususurious interest paid by the plaintiff to defendant bank at several renewals of the note.

The facts as found by the referee, Hon. C. W. Hamlin, are as follows, to-wit: That within two years next before filing the petition plaintiff had paid $415.85 *in cash* to the defendant Bank at the several renewals of a note of $2240, which was admitted by the defendant and found by the referee to be in excess of 8 per cent., the legal rate of interest in Missouri.

That no exceptions were filed by either party to the referee's report, and judgment was rendered for plaintiff for twice the said sum, or $831.70.

From this judgment the defendant Bank appealed to the Supreme Court of Missouri, which reversed the Circuit Court's decision, and the case is brought here on writ of error.

The only point made by the defendant Bank is that the principal debt was not paid at the bringing of the suit, and the decision of the Supreme Court of Missouri makes this payment of the principal debt a condition precedent to plaintiffs suit to recover under this statute.

ASSIGNMENT OF ERROR AND PRAYER FOR REVERSAL.

Now come appellants in error and state to your honor that errors have been committed by the supreme court of Missouri against the rights of your appellants in the decision against appellants, in this:

I.

Appellants were entitled to the rights they claim in this petition under section 5198 of the Revised Statutes of the United States in 1878, which is denied by the decision in this case by the supreme court of Missouri.

II.

Also said decision of the supreme court of Missouri denies to appellants their claim under the laws of the United States as construed by the Supreme Court of the United States in care of Brown vs. Marion National Bank, 169 U. S., 416.

III.

The supreme court of Missouri denies the rights to the appellants under the United States statute, section 5198, as construed by every court of last resort in the United States, some of which are:

See Nebraska First National Bank vs. Smith, 54 N. W. Rep. 254

See in Pennsylvania, A. Brown vs. Second National Bank, 72 Pa., 209.

See in New Jersey, National Bank vs. Carpenter, 19 Atlantic Rep., 181.

See in West Virginia, Lynch vs. Bank, 2 W. Va., 994.

See in Kentucky, Henderson National Bank vs. Alver, 15 S. W., 132.

See in Texas, Stout vs. Ennis National Bank, 69 Texas, 384, 8 S. W. Rep., 808.

See in Nebraska, Exeter National Bank vs. Orchard, 61 N. W. Rep., 833.

4 See in Pennsylvania, Lebanon National Bank vs. Karmany, 98 Pa. St. 65.

Also U. S. Supreme Court, Brown vs. Marion National Bank, 169 U. S., 416.

BRIEF.

This suit is brought under the second clause of section 5198 of the Revised Statutes of the United States for 1878, which reads as follows, to-wit:

"In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back in an action in the nature of an *action of debt, twice the amount* of the *interest* thus paid, from the association taking or receiving the same, provided *such action* is commenced *within two years* from the time the *usurious transaction occurred.*

There were eight usurious transactions. The bank demanded and received usurious interest eight times, each constituting a violation of the act of congress prohibiting usury referred to above. The action is for a penalty, not for the principal debt. There is no allusion to it in the law or petition. That is not required to be paid before suit is brought. The language of the statute is "in case the greater rate of interest *has been paid*, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt twice the amount of the interest *thus paid*, from the association taking or receiving the same. Provided such action is commenced within two years from the time the usurious transactions occurred."

The penalty imposed must be sued for within two years after the illegal interest is paid, or the suit will be barred.

The court below bases its decision on the sole ground that the principal debt has not been paid, thereby creating a condition not provided for by the statute. The principal debt was not due, and plaintiffs were not required to pay it till due By exercising their legal rights in not paying until mature, their cause of action under the construction would have been barred, if the ruling of that court was correct. It has attempted to add a condition to the provisions of the statute not contained in it and to deny to plaintiffs the ex-

ercise of the rights granted to them by the statutes.

If the ruling of the court below is correct those who commit crimes of this sort can avoid the penalty by refusing to receive payment of the debt until the limitations have run; or may transfer such securities until the action is barred and by so doing defeat the operation of the law in question.

This question has been under consideration in the highest court of a number of the states and they have uniformly held that the right to recover doesn't depend upon the payment of the principle.

In Bank vs. Orchard, 61 N. W., Reports 833, the court said:

"We know of nothing in the act of congress which by any reasonable construction could be held to imply that a party's right of action against a National Bank, to recover twice the amount of usurious interest paid the bank for the use of a loan of money made to him by the bank, depends on his first paying the principal of the usurious loan, nor have we been cited to, or been able to find, any decision, *of any court* which so held."

In Stout et al vs. Ennis Natio al Bank, 69 Texas, 384 same case 8 S. W. Rep. 808, the Supreme Court of Texas says, "The appellee insists that the right to the penalty (under U. S. Statute) could not attach until the entire debt was paid, * * * "When, however, the parties as they did in this case, appropriate and intend to appropriate the payment to the usurious interest, the *locus penitentiae* can no longer exist, for the offense has been consummated" "The *greater rate of interest has been paid*, the right to the penalty is fixed." "The interest contracted for being usurious, the *Act of Congress* declared it all forfeited, and there was no legal claim for interest on which the payments could have been appropriated, the right to the penalty attached." The above is squarely the case at bar.

In Pennsylvania Supreme Court in the case of Lebanon National Bank vs. Karmany 98 Pa. St. 65. (See 8 clause of Silibus Page 66.) "Suit may be brought for the penalty by the person paying the usurious interest at any time after the said payment, even

though the indebtedness on which the usurious interest was paid has *not been discharged*."

"It is alleged that the Court erred in refusing the defendants points that no recovery can be had for the penalty under section 5198, unless the debt was also paid." After stating the Statute the Court, top of page 75, says:

"Two categories are thus defined and the consequences denounced.

1. Where illegal interests have been knowingly stipulated for but not paid, there only the sum, but without interest, can be recovered.

2 Where such illegal interest has been paid, then twice the amount so paid can be recovered in a penal action of debt or suit in the nature of such action against the offending Bank, brought by the person paying the same or their legal representatives."

Bennett vs. National Bank, 8 Otto, 555.

"The terms of the Statute are too plain for different constructions. If illegal interest be contracted for, the debt shall bear no interest. If such interest be paid, the offending Bank is liable in an action for twice the amount. That liability is incurred the *moment* the *Bank* receives the illegal interest. The intendment is to prevent Bankers contracting or receiving more than lawful interest for the use of money."

"To permit a Bank which had actually received illegal interest, when sued for the penalty, to chop round and call it a credit, the principal would violate the vindicatory clause of the Statute. In such case the taking would amount to nothing more than a contracting to receive. The Statute inflicts twice the penalty for taking that it does for contracting."

Monongahala National Bank vs. Orchard 38 Leg. Intell., 185.

On same page, 75, the Court, in speaking of State Statutes, says:

"Such Statutes and decisions under them throw no light on the question now pending."

"This case clearly shows that the reference to the former decisions of Missouri under State statutes, the common law, or equity are not applicable to a case under this U. S. Banking Act

Brown vs. Marion National Bank, 169 U. S. 416. 18 vol. Nat. Rep. U. S. Supreme Ct. 390.

The U. S. Supreme Court, after quoting Sec. 5198 U. S. Statutes, says :

"The last section clearly makes a difference between interest which a note, bill or other evidence of debt, held by a National Bank "*carries with it*, or which has been agreed to be paid thereon" and interest which *has been* "*paid.*"

And further says:—"Sometimes interest is said to have been paid when it is evident that it was only included in a renewal note. But that as we have said *was not payment* within the meaning of the statute."

"We think the statute cannot be so construed. If within the meaning of the statute interest is (*paid*) simply by including it in a renewal note, it WOULD FOLLOW that as soon as the *usurious interest* is included in the *renewal note*, the *borrower* or obligor could sue the *lender* or obligee and recover back *twice* the amount of the interest thus paid when he HAD NOT in fact PAID THE DEBT, nor ANY PART OF THE INTEREST AS SUCH."

"This cannot be a sound interpretation of the statute. The words, in case the GREATER RATE OF INTEREST HAS BEEN PAID in section 5198, refer to INTEREST ACTUALLY PAID, as distinguished from INTEREST INCLUDED IN THE NOTE and only (agreed to be paid.")

"If at any time the obligor ACTUALLY PAYS USURIOUS INTEREST, AS SUCH the usurious transaction MUST BE HELD to have then—and not before, occurred, and he MUST SUE WITHIN TWO YEARS THERE AFTER."

This Brown decision by this U. S. Supreme Court, is squarely in point against the Bank in the case at bar.

It also shows the error of the Bank counsel in taking the posi-

tion which they did in their briefs, and which the Missouri Supreme Court adopted to the effect that "McBroom had paid usurious interest," etc. Hence the error and the necessity of this appeal.

This Court squarely holds in the case of Brown vs. National Bank 169, U. S. 416: "If the obligor *actually pays usurious interest as such, the usurious transaction must be held to have then, and not before, occurred.* and he must sue within two years thereafter" This is appellants plaintiffs position. Can it be stated plainer. *We paid the usurious interest as such.* The note was renewed from time to time, by executing new notes for the same principal debt, the interest having been paid in cash at each renewal. Then each payment was a separate usurious transaction. The U. S. statute says, and this court here so holds. And all the supreme courts of the several states so hold. The Missouri supreme court is therefore in error. And their decision should be reversed, by this court in the case at bar.

In the Court of Appeals in Kentucky, on June 22, 1891, construing this U. S. Statute, second clause, Sec 5198, says:

"We also think that the limitation of two years prescribed by the statute, within which an action may be commenced, begin to run, in the language of the statute, 'from the time the usurious transaction occurred," which appear to have been in each instance mentioned in the appellant's petition or the dates, *and not times of payment*, of the several notes"

The Statutes of Missouri and decisions under them referred to by the Supreme Court of Missouri, upon the subject of usury and the decision under the common law and equity suits "may be laid out of view They cannot effect the case," as decided by this court in Barrett et. al, vs. National Bank, 91 U. S., 555. There under said decision by this court it is held :

'Two categories are thus defined and the consequences denounced."

1 "Where illegal interest has been knowingly stipulated for, *but not paid*, there only the sum, but without interest, can be recovered"

2. "Where such illegal interest *has been paid*, then twice the amount so paid can be recovered *in a final action of debt*, or suit in the nature of such action against the offending Bank, brought by the person paying the same, or their legal representative."

"The statutes of Ohio and Indiana upon the subject of usury may be laid out of view, they cannot affect the case." x x x "The prosecution shall be a suit *brought specially and exclusively for that purpose*. where the *sole* issue is the guilt or innocence of the accused without the presence of any extraneous facts which might confuse the jury to the prejudice of *either party*."

Therefore under the decision of this court, in 91 U. S., 555. the question of payment of the principal debt under this statute in regard to usury, cannot be raised.

In Farmers and Mechanics National Bank vs. P. C. Deering, 91 U. S., Rep. 29, in speaking of the law under consideration, your honors said:

"In any view that can be taken of the 30th Section the power to supplement it by State legislation is conferred neither expressly nor by implication. There is nothing which gives support to such a suggestion."

"The 30th Section is remedial as well as penal, and it is to be liberally construed to effect the object which congress had in view in enacting it." Gray vs Bennett, 3 Met., 522-529."

"The 46th Section of the Banking act of Feb. 25th, 1863, 12 Stat. at L. 679, declared that reserving or taking more than the interest allowed should "be held and adjudged a forfeiture of the debt or demand."

"In the act of 1864, 13 Stat., at L. 108, the forfeiture of the debt is omitted and there is substituted for it the forfeiture of the interest stipulated for if it had only been reserved, and the recovery of twice the amount where the interest had been actually paid."

"This section has been elaborately considered by the highest court of Massachusetts, of Pennsylvania, of Ohio and Indiana, etc."

In this court in Stephens vs. Monongahala National Bank, 111 U. S., 197, is stated again the difference between interest contracted and *interest paid*. Referring to Bennett vs Bank 98 U. S. 555, it says: "The ground of that decision was that *without the statute* there could be no recovery from the Bank for usurious interest so *actually paid*, the Statute which created the right to such recovery also prescribed the remedy. That remedy was *exclusive* of all others for the enforcement of that right. Bank vs. Deering 91 U. S. 29."

How can these decisions be harmonized with the Missouri decision in the case at bar? That other conditions not in that Statute which alone governs must be first complied with, (to-wit: the payment of a principal debt to a Bank not now in existance, hence plaintiff could not sue as the Statute does not provide a suit against a bank's former stockholder or officer.) The case at bar where the Central National Bank no longer exists, is a good reason for the rule that the payment of the principal does not affect the plaintiff's rights where usurious interest is actually paid and received.

This court, in Carter vs Carusti 112 U. S., 478, under District of Columbia, Statute, says, "This is not a suit to recover back usurious interest paid, but to enforce the collection of the note upon which it is contended that usurious interest was received. The plaintiff in error did not pay the unlawful interest but it was paid by Daniels, and it was paid by him more than a year (two years in U. S. Stat.) before this suit was brought, and more than a year before the defense set up by the plaintiff in error. If Daniels himself who paid the alledged usurious interest, had brought a suit to recover it back, his action would have failed, *because not begun within the time provided by the Statute.*"

This case shows that the *time* for bringing the suit has no reference to the payment of the principal. But from the plain language of the Statute which prescribes the penalty, the separate suit must be brought within the limit of two years from the payment of the usury.

In Scotch Mortgage Company vs. McBroom, decided in the supreme court of New Mexico, it will be seen in 30 Pacific Reporter, 859, see page 861, that McBroom gave his note for $65,000, but only took with him $58 500.

That $6,500 was reserved or deducted from the note—not actually paid, as in the case of plaintiffs renewals, where plaintiffs note remained the same. Plaintiff paid cash to get it extended from time to time.

The New Mexico statute differed from the United States statute, section 5198, in not *forfeiting the legal interest*, but only the excess, Hence McBroom had paid no excess, hence no usury.

The facts are different, and the law is decided to be different by all the courts, save and except the mistake in the case at bar. Should you not reverse it?

So Brown vs. Marion National Bank, 169 U. S., 416, says:

"If the note when sued on includes usurious interest or interest upon usurious interest agreed to be paid, the holder in due time may elect to remit such interest, and it cannot then be said that usurious interest was paid to him. McBroom against Investment Co., 153 U S., 318."

"If at any time the obligee actually pays usurious interest *as such*, the usurious transaction must be held to have then, and not before, occurred, and he must sue within two years thereafter."

Thus the McBroom case is clearly distinguished from the case at bar

The rule is thus well stated by the supreme court of Massachusetts in the case of Stevens vs. Lincoln, 7 Metcalf, 528:

"While the usurious interest remains unpaid there remains the *locus penitentiae*. Where, however, the parties, as they did in this case, appropriate the payment of usurious interest *locus penitentia* can no longer exist, for the offense has been consummated, the greater rate of interest has been paid, and the right to the penalty fixed."

The supreme court of Nebraska in the 54 N. W. Rep., 254, case of First Nat. Bank vs. Smith, says:

"The question presented involves the true interpretation of the proviso clause of section 5198 of the Revised Statutes of the United States"

"It does not refer to the time the contract is entered into, nor is it the payment of the principal sum borrowed which gives the right to sue for the penalty. The receipt of the illegal interest is the foundation of the borrower's right to recover the penalty, and the actual payment of the interest in excess of the legal rate is the usurious transaction referred to in the section."

"The period of limitation begins to run from the time the cause of action accrues."

"If the interpretation for which plaintiffs (appellants) contend should be adopted, then it would follow that a suit to recover the penalty for the taking of usurious interest by a national bank cannot be maintained until the loan is fully paid off."

"Stated differently, one who has paid large sums as illegal interest on a loan and is unable to pay the entire debt is not entitled to the benefit of the section."

"Such was not the intention of Congress, nor is it the fair and reasonable import of the language of the section."

"The right to maintain the action to recover the penalty prescribed by said section 5198 accrues as soon as the unlawful interest is paid, and the two years' limitations begin to run from the time such payment was made." And cites a number of cases.

Brown vs. Second National Bank, 72 Pa. St., 209, Judge Sharswood, for the supreme court of Pennsylvania, in 1872, in construing section 5198, United States statutes, says:

"It is actual payment on the foot of the usurious contract, either in part or in whole, which consummates the usury and from which the limitation of the action for the penalty commences to run."

By the court of errors of New Jersey in National Bank vs. Carpenter, 19 Atlantic Reporter, 131; construing section 5198, United States statutes: "The statute of limitation begins to run from the time the interest is paid."

In Henderson vs. Second National Bank, Kentucky supreme court, 1891, 15. S. W. Rep., 1321, says:

"United States statute, section 5198, gives a right within two years, and: "The date runs from the usurious transaction and not from payment of the note."

Same, Lynch vs. Bank, 22 W. Va., 554.

Say "the statute of limitations is two years from the payment of interest."

"Each payment of illegal interest must be regarded as a transaction, within the intent of the statute; and when the payment is made or actually occurs the two years' limitation begins to run, as to that payment, from that time, and so on each successive payment or renewal of the same loan."

Therefore, under the plain language of the statute; under all the decisions construing the same; under all the reasons and intendment of the law, we most sincerely believe that the case at bar should be reversed and the decision of the Circuit Court affirmed.

Very Respectfully,

JAMES BAKER,

Attorney for Appellants.

No. 62.

Office Supreme Court U.S.
FILED
OCT 18 1901
JAMES H. McKENNEY
Clerk

Brf. of Baker & Haseltine for P. E.

Filed in Oct. 18, 1901.

Supreme Court of the United States,

OCTOBER TERM, 1901.

NO. 62.

S. A. AND S. C. HASELTINE, Plaintiffs in Error, vs. THE CENTRAL NATIONAL BANK OF SPRINGFIELD, MISSOURI.	October Term, 1901. No. 62.

Brief for Plaintiff in Error on Motion to Dismiss.

JAMES BAKER. ✓
S. A. HASELTINE,
Attorneys for Plaintiffs in Error.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1901.

NO. 62.

S. A. AND S. C. HASELTINE, PLAINTIFFS IN ERROR

vs.

THE CENTRAL NATIONAL BANK OF SPRINGFIELD, MISSOURI.

I.

This writ of error should not be dismissed. The case should be heard on its merits.

II.

As the case is soon to be called on the docket we most respectfully request that the motion be taken up with the merits.

III.

This writ was brought under the second clause of section 5198 of the United States statutes.

At the trial all the facts alleged were found by a referee, undisputed and admitted. There are no disputed facts, nothing to be retried.

The Circuit Court below gave plaintiffs judgment.

The Supreme Court of the State reversed the judgment upon the same facts and denied the plaintiffs in error rights under the United States statutes. The defendants in error admitted in their brief in the Missouri Supreme

Court that they violated the law. The only question of decision, the only question in the case, was the construction of the United States statute. (See page 15 of Record of the opinion of the Court). It says: "The sole defense is that a party who has paid ruinous interest cannot maintain an action, under the statute, to recover twice the amount so paid until he has paid the principal sum due, or at least unless he tenders the principals, and it is admitted that the plaintiffs have not done this."

Was not this case squarely decided by that Court on its merits? Did they not put their construction on this United States statute that deprives these plaintiffs of their rights? On page 19 of the Record the Court says:

"The plaintiffs herein are not entitled to maintain their action, for there is no allegation or proof that they have paid or offered to pay for the debt actually due—that is, the amount actually received by the plaintiffs from the defendants." On page 20 of the record they say: "So regarded, it cuts off the plaintiffs' right to maintain this action." Therefore they expressly hold that the action is at an end, and reverse the judgment, saying (Rec. Page 20):

"The judgment of the Circuit Court is, therefore, reversed, and the case remanded to be proceeded with in accordance herewith."

Was the case ordered retired? No. Any other facts to be found? No. Has the lower court any judicial discretion left? No. The lower court is told the judgment is reversed and the course of action cut off under the law.

IV.

This writ of error is the proper remedy of the plaintiffs. And under Section 709 of the United States statutes it is brought here for review. This law providing for writs of error would be nugatory if the Supreme Courts could prevent this Court from reviewing its decisions by deciding a case on its merits, and then return the case to the lower courts to set aside the judgment and dismiss the action. Such is not the law.

POOR COPY

V.

The law as laid down in Mower vs. Fletcher, 114 U. S., 127, fully sustains this writ of error. This Court says: "That judgment is final for the purposes of a writ of error to this Court, which terminates the litigation between the parties on the merits of the case." * * * Nothing remains to be done but to require the inferior court to perform the ministerial act of entering the judgment in that Court which has been ordered. This is but carrying the judgment of the Supreme Court which has been rendered into execution. Nothing is left to the judicial discretion of the court below. The cases relied on in support of the motions to dismiss were all judgments or decrees of reversal, with leave for further proceedings in the inferior court. "Such judgments are not final, because something yet remains to be done to complete the litigation."

VI.

The statute of limitations of two years from the time of the several payments has elapsed and plaintiffs could not bring another action.

Were not the plaintiffs' rights fully settled by this decision?

In addition to the two-year statute the defendant is no longer in existence. There is now no such bank to be served with summons; hence they could not be sued again in a new action under the statute. Therefore the plaintiffs had no rights left either under their action then prosecuted, except this writ of error. As plaintiffs by said decision are left without remedy. It fully sustains the plaintiffs' writ of error.

Is there any judicial discretion left to the Court below? If this Court affirms the judgment, the plaintiffs' cause of action is ended. If this motion to dismiss is sustained, the plaintiffs are out of Court and without remedy.

The facts all being admitted and undisputed, the only question in the case, and on which all the rights of the parties depends, is the construction of the United States statute.

VII.

Why go over the road again to get to this Court for final settlement? There are no new facts to be determined by a new trial. None to try. No new trial ordered. No other statute to be construed. The Supreme Court of the State has rendered its decision. It is final that plaintiffs' judgment be reversed, and plaintiffs' cause of action be cut off. Therefcre, the concluding order does not deprive the judgment of its finality, or give the Circuit Court any judicial discretion in the matter. The petition stated the facts and they all stand admitted. Can plaintiffs create a new cause of action by paying the debts and bringing a new writ? No; the bank does not exist, and there are no provisions for suing the representatives. Therefore, plaintiffs' rights are fully settled in this action which the Missouri Supreme Court says are "cut off." Hence, we are properly in this Court.

VIII.

If the Court holds that a tender or offer to pay the defendant bank the amount of the face of the note is necessary, and that an amendment is permissible, then plaintiffs ask that said amendment be considered and hereby asked for and made that the case may be ended here. And plaintiffs stand ready to pay the money into court or as the Court may direct. But, as the plaintiffs claim a credit of about $500, on the principal debt in suit No. 63 on this docket, the said money should be held subject to the Court's order. And as the bank is now out of existence, if the money were paid it would leave plaintiffs without remedy on their judgment.

For reasons stated, plaintiffs ask that the motion be not sustained, but that the case be heard on its merits.

JAMES BAKER,
S. A. HAZELTINE,
Attorneys for Plaintiffs in Error.

No. 62.
Brief of Ridout for D. C. (Mo.)

Office Supreme Court U. S.
FILED
OCT 12 1901
JAMES H. McKENNEY,
Clerk.

Filed October 12, 1901.

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 62.

S. A. AND S. C. HAZELTINE, *Plaintiffs in Error,* vs. THE CENTRAL NATIONAL BANK OF SPRINGFIELD, MISSOURI.	October Term, 1900. No. 62.

BRIEF FOR DEFENDANT IN ERROR ON MOTION TO DISMISS.

JOHN RIDOUT,
Attorney for Defendant in Error, for the purposes of this Motion.

LAW REPORTER PRINT.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 62.

S. A. AND S. C. HASELTINE, PLAINTIFFS IN ERROR,

vs.

THE CENTRAL NATIONAL BANK OF SPRINGFIELD, MISSOURI.

Comes now the defendant in error and moves the court to dismiss the writ of error in this case for want of jurisdiction, because the judgment of the Supreme Court of the State of Missouri, to which the writ of error was directed, was not a final judgment.

JOHN RIDOUT,
Attorney for Defendant in Error, for the purposes of this Motion.

To Mr. JAMES BAKER,
Attorney for Plaintiffs in Error:

Please take notice that on the 14th day of October, A. D. 1901, at the opening of the court or as soon thereafter as counsel can be heard, the motion of which the foregoing is a copy, will be submitted to the Supreme Court of the United States for the decision of the court thereon.

Annexed hereto is a copy of my brief or argument in support of said motion.

JOHN RIDOUT,
Attorney for Defendant in Error, for the purposes of this Motion.

IN THE SUPREME COURT OF THE UNITED STATES

S. A. AND S. C. HAZELTINE,
Plaintiffs in Error,
vs.
THE CENTRAL NATIONAL BANK
OF SPRINGFIELD, MISSOURI.

October Term, 1900.
No. 62.

BRIEF FOR DEFENDANT IN ERROR ON MOTION TO DISMISS.

STATEMENT OF THE CASE.

This is an action brought originally in the Circuit Court for Greene County, Missouri, by the plaintiffs in error against the defendant in error, to recover twice the amount of alleged usurious interest, the action being founded upon the provisions of the second clause of section 5198, of the Revised Statutes of the United States.

The trial court rendered judgment in favor of the plaintiffs in error for $831.70.

From this judgment the defendant in error appealed to the Supreme Court of the State of Missouri, which court reversed the judgment of the trial court and remanded the cause for further proceedings in accordance with its opinion (Rec., pp. 8 to 11, 14 and 15).

The plaintiffs in error sued out a writ of error professedly under the provisions of section 709 of the Revised Statutes of the United States (Rec., p. 1).

The defendant in error now moves the court to dismiss the writ of error on the ground that the judgment sought to be reviewed by the writ of error, is not a final judgment

within the meaning of section 709, of the Revised Statutes of the United States.

In support of this contention, it is submitted that from a very early period in the history of this court and upon the soundest principle of appellate procedure, the following proposition has been established:

That the judgment of the highest court of law of a State is not a final judgment within the twenty-fifth section of the Judiciary Act of 1789 (Sec. 709, Revised Statutes of the United States), if the cause has been remanded to the inferior State court for further proceedings consistent with the judgment of the highest court.

This proposition is supported by an unbroken line of decisions of this court.

It is not deemed proper to cite all of these decisions, but the following are cited as especially applicable to the case at bar:

Parcels *vs.* Johnson, 20 Wallace, 653.
McCouch, Exr., *vs.* Commissioners, etc., 91 U. S. 1.
Baker et al. *vs.* White, 92 U. S. 176.
Bostwick *vs.* Brinkerhoff, 106 U. S. 3.
Johnson *vs.* Keith, 117 U. S. 199.

Upon principle and authority it is respectfully submitted that this writ of error should be dismissed.

JOHN RIDOUT,
Attorney for Defendant in Error, for the purposes of this Motion.

No. 62.

Brf. of Ridout for D. E.

Office Supreme Court U. S.
FILED
OCT 28 1901
JAMES H. McKENNEY, Clerk.

Filed Oct. 28, 1901.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 62.

S. A. AND S. C. HASELTINE,
PLAINTIFFS IN ERROR,

vs.

THE CENTRAL NATIONAL BANK OF SPRINGFIELD, MISSOURI.

Brief for Defendant in Error on the Merits.

JOHN RIDOUT,
Attorney for Defendant in Error.

LAW REPORTER PRINT.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 62.

S. A. AND S. C. HASELTINE,
PLAINTIFFS IN ERROR,

vs.

THE CENTRAL NATIONAL BANK OF SPRINGFIELD, MISSOURI.

Brief for Defendant in Error on the Merits.

In this case, a motion by the defendant in error to dismiss the writ of error because the judgment below was not final, has been submitted and is now under consideration by this court. Inasmuch as this case may be called before the said motion is disposed of, the defendant in error not waiving, but insisting upon its motion to dismiss, deems it proper to submit this Brief upon the merits.

There is a single question presented on this Record: If the judgment below was of such a character that the writ of error can be sustained, the defendant in error insisting that the writ must be dismissed for the reasons stated in the Brief heretofore filed in support of its motion.

That question is, Whether under section 5198 of the Revised Statutes of the United States, a person who has paid usurious interest to a national bank can recover double the amount thereof before the debt in respect of which such interest has been paid, has itself been fully paid.

This question has been settled against the right to recovery under such circumstances, by the case of—

McBroom *vs.* Scottish Investment Co., 153 U. S. 318.

In this case the question involved was the construction of a statute of New Mexico, but this court, in the course of the opinion, calls attention to similarity between that statute and the provisions of section 5198, and then proceeds to hold that there can be no recovery for usurious interest until the debt has been fully paid, because until that event happens, it can not be truly said that usurious interest has been paid.

The construction by this court of a section of the National Bank Act must, for obvious reasons, prevail over any contrary decisions of State courts.

Bank *vs.* Dearing, 91 U. S 33.

Plaintiffs in error really concede the accuracy of the above contention, but insist that McBroom *vs.* Scottish Investment Company is overruled by—

Brown *vs.* Marion National Bank, 169 U. S. 416.

But this is a misapprehension of the scope of the decision in the case last cited. Examination of the record in that case discloses that the single question presented to the court was whether, under section 5198, usurious interest included in a note thereby became part of the principal and was protected from the operation of that section.

Not only is there nothing in the opinion which contravenes the decision in McBroom *vs.* Scottish Investment Co., *supra*, but Mr. Justice Harlan, who wrote the opinion in both cases, cites the McBroom case in support of some of the propositions enunciated in the Brown case, so that the latter case, if not an express affirmance of the McBroom case, distinctly approves it.

It is deemed wholly unnecessary to do more than call the

court's attention to the unanswerable reasoning of the McBroom case.

It is an interesting fact, as appears in the Brown case, that precisely what is contended for on the motion to dismiss filed in this cause, was decided in that cause.

The Brown case, which came from Kentucky, first appeared in this court on a writ of error to the Court of Appeals of Kentucky on a judgment reversing the judgment below and remanding the cause for further proceedings. This writ of error was dismissed on motion for want of finality in the judgment below.

Brown *vs.* Baxter, 146 U. S. 619.

The case reported in 169 U. S. was brought to this court on a writ of error from the final judgment ultimately rendered.

It is submitted that the motion to dismiss should be granted, but if the court should not be of that opinion, then that the judgment below should be affirmed.

JOHN RIDOUT,
Attorney for Defendant in Error.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No ~~220~~ 63.

S. A. AND S. C. HASELTINE AND S. I. AND L. K. HASELTINE, PLAINTIFFS IN ERROR,

vs.

THE CENTRAL NATIONAL BANK OF SPRINGFIELD, MISSOURI.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

FILED MAY 12, 1900.

(17,760.)

(17,760.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No 280.

S. A. AND S. C. HASELTINE AND S. I. AND L. K. HASELTINE, PLAINTIFFS IN ERROR,

vs.

THE CENTRAL NATIONAL BANK OF SPRINGFIELD, MISSOURI.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

INDEX.

	Original.	Print.
Writ of error	1	1
Citation	2	2
Assignment of errors	3	2
Transcript filed	5	3
Transcript from Greene county circuit court	5	3
Petition	5	4
Amended answer filed	7	5
Amended answer	8	5
Referee's report filed	15	9
Referee's report	16	10
Deposition of S. A. Haseltine	20	12
Defendants' instructions asked	25	15
Judgment of circuit court	26	15
Motion for new trial filed	27	16
Motion for new trial	28	16
Appeal granted	29	17

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 18, 1900.

	Original.	Print
Bill of exceptions signed	29	17
Circuit clerk's certificate	29	17
Cause argued and submitted	30	17
Judgment of supreme court	30	18
Opinion	31	18
Motion for rehearing filed	37	22
Motion for rehearing	37	22
Motion for rehearing overruled	39	23
Writ of error allowed, citation signed, appeal bond approved	40	23
Assignment of errors	40	23
Writ of error bond	42	24
Clerk's certificate	44	26

1 UNITED STATES OF AMERICA, *sct:*

The President of the United States of America to the judges of the supreme court of Missouri, division No. 1, Greeting:

Because in the records and proceedings, and also in the rendition of the judgment of a plea which is in the said supreme court, before you, between The Central National Bank of Springfield, Missouri, and S. A. and S. C. Haseltine and S. I. and L. K. Haseltine, a manifest error hath happened, to the great damage of the said S. A. Haseltine *et al.*, as by their complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington, D. C., not exceeding thirty days from the date of signing the citation, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court.

Issued at office, in Springfield, this 19th day of March, A. D. 1900.

{ Seal of the United States Circuit Court, Southern Division of the Western Judicial District of Missouri. }

SARAH A. LATHIM, *Clerk*,
By REUBEN Y. THOMSON,
Deputy Clerk.

Allowed.
THEO. BRACE,
P. Judge, Division No. 1, *Supreme Court of Missouri.*

[Endorsed:] #9037. United States circuit court, southern division of the western district of Missouri. The Central National Bank *vs.* Haseltine *et al.* Writ of error. Filed Apr. 5, 1900. Jno. R. Green, clerk.

SOUTHERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI, *sct:*

I do hereby return due and perfect obedience to the within writ, and do herewith, under the seal of said supreme court, distinctly and openly, send the record and proceedings aforesaid, with all things concerning the same.

Witness my hand as clerk and the seal of said court.

Done at office, in Jefferson City, this 16th day of April, A. D. 1900.

[Seal of the Supreme Court of Missouri.]

JNO. R. GREEN, *Clerk*,
By —— ——, *Deputy Clerk.*

2 UNITED STATES OF AMERICA, *sct:*

To the Central National Bank of Springfield, Missouri, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington, D. C., thirty days from and after the day this citation bears date, pursuant to a writ of error *filed in* issued from the clerk's office of the circuit court of the United States for the southern division of the western district of Missouri and filed in the office of the clerk of the supreme court of Missouri, wherein S. A. Haseltine *et al.* are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Theodore Brace, judge of the supreme court of the State of Missouri, this fifth day of April, in the year of our Lord one thousand nine hundred.

THEO. BRACE, *Judge.*

[Endorsed:] # 9037. United States circuit court, southern division of the western district of Missouri. Haseltine *et al. vs.* The Central National Bank. Citation.

UNITED STATES OF AMERICA, *Western District of Missouri,* } *ss:*

I hereby acknowledge due service of the within citation this seventh day of April, A. D. 1900.

MASSEY & TATLOW,
Attorney for Defendant in Error.

3 In the Supreme Court of the United States, October Term, 1900.

THE CENTRAL NATIONAL BANK, Respondent in Error,
vs.
S. A. HASELTINE ET AL., Appellant- in Error.
} Assignment of Error and Prayer for Reversal.

Now come appellants in error and state to your honor that errors have been committed by the supreme court of Missouri against the rights of your appellants, in this:

I.

Appellants were entitled to the rights of certain credits applied upon the note of respondent under the Revised Statutes of the United States of 1878, sec. 5198.

II.

Appellants are entitled to the said credits under the said United States statutes a*nd* construed by the Supreme Court of the United

States in the case of Brown *vs.* Marion National Bank, 169 U. S., 416.

III.

That the decision against appellants is also against the statutes of Missouri. Act of April 21st, 1891, page 170.

IV.

That the decision against appellants is also against the prior decisions of Missouri—see Maniteau National Bank *vs.* Miller, 73 Missouri, 187—which last case was subsequent to the case of Burnett *vs.* National Bank, 98 U. S., 555, and is indirectly approved in the case of Brown *vs.* Marion National Bank, 169 U. S., 416.

V.

Said judgment is for 8 % interest, when the law of Mo. only provides for 6 % when no rate is agreed upon, or, as in this case, where the rate is usurious and is forfeited..

4 Appellants ask that the judgment in the above-entitled case be reversed, and that appellants be permitted to have their joint and rightful claims.

S. A. HASELTINE &
GEO. S. RATHBUN,
Att'ys for Appellants.

[Endorsed:] # 9037. In the Supreme Court of the U. S. The Central National Bank, respondent in error, *vs.* S. A. Haseltine *et al.*, appellant- in error. Assignment of errors and prayer for reversal. Filed Apr. 5, 1900. Jno. R. Green, clerk. Rathbun & Haseltine, att'ys for appellants in error.

5 In the Supreme Court of Missouri.

STATE OF MISSOURI, *sct:*

Be it remembered that heretofore, to wit, on the 18th day of January, 1898, there was filed in the clerk's office of the supreme court of the State of Missouri a transcript, wherein The Central National Bank was plaintiff, respondent, and S. A. Haseltine *et al.* were defendant-, appellants; which said transcript is in words and figures as follows, viz:

Transcript of the record and proceedings had in our Greene county circuit court, in the cause wherein The Central National Bank is plaintiff and S. A. Haseltine *et al.* are defendants, to wit:

Be it remembered that on the 24th day of December, 1896, there was filed in the office of the clerk of the circuit court a petition in the above-entitled cause; which said petition is in the words and figures following, to wit:

In the Circuit Court of Greene County, Mo., January Term, 1897.

CENTRAL NATIONAL BANK, a Corporation, Plaintiff,
vs.
S. A. HASELTINE, S. C. HASELTINE, S. I. HASELTINE, & L. K. Haseltine.

Plaintiff states that it is a corporation duly incorporated under the laws of the United States as a national bank of deposit and discount.

That on June 15th, 1896, for value received, the above-
6 named defendants executed and delivered to plaintiff their promissory note, in which they agreed thirty days after date to pay to the plaintiffs or order $2,240.00, with interest at 8 % per year from maturity; if not paid annually, to be compounded; which said note is in words and figures as follows:

$2,240.00. SPRINGFIELD, Mo., *June 15th*, 1896.

Thirty days after date we or either of us, as principals, promise to pay to the Central national bank or order twenty-two hundred and forty dollars, for value received, at the Central national bank, at Springfield, Mo., with interest at the rate of eight per cent. per annum from maturity and payable annually, and if not so paid to be compounded.

(Signed) S. A. HASELTINE.
S. C. HASELTINE.
S. I. HASELTINE.
L. K. HASELTINE.

Plaintiffs further say that the said defendants nor neither of them have paid said note or the interest thereon or any part thereof, but are now justly indebted to this plaintiff in the sum of $2,240.00, with interest at eight per cent. from June 15th, for which amount plaintiffs pray judgment, with cost of suit.

B. U. MASSEY,
W. D. TATLOW,
Attorneys for Plaintiff.

And on the back of said petition is the following endorsement, to wit:

Filed Dec. 24, 1896. J. M. Yarbrough, clerk.

7 Circuit Court, Greene County, January Term, 1897.

1st Judicial Day, Monday, January 11th, 1897.

STATE OF MISSOURI, } ss:
County of Greene, }

Be it remembered that a regular term of the circuit court within and for the county of Greene and State of Missouri was begun and held at the circuit court house, in the city of Springfield, in said county of Greene, in the twenty-third judicial circuit of Missouri, on the second Monday in January, being the 11th day of January, in

the year of our Lord eighteen hundred and ninety-seven, at which were present:

Hon. Jas. T. Neville, judge of the 23rd judicial circuit of Missouri.
J. S. Owen, sheriff of Greene county, Missouri.
A. D. Allen, stenographer of said court.
J. M. Yarbrough, clerk of said court.

Amended Answer. Filed by Leave of Court.

CENTRAL NATIONAL BANK, Plaintiff,
vs.
S. A. HASELTINE ET AL., Defendants.

Now, at this day, come the above defendants, by attorney, and files herein, by leave of court, their amended answer to the petition of plaintiff heretofore filed herein in the above cause.

Which said amended answer is in the following words and figures, to wit:

8 In the Circuit Court of Greene County, State of Mo., Jan. Term 1897.,

THE CENTRAL NATIONAL BANK, a Corporation, Plaintiff,
vs.
S. A. HASELTINE, S. C. HASELTINE, L. K. HASELTINE, & S. I. Haseltine.

Defendants, for answer to the petition of plaintiff filed herein, come and admit that they executed the note sued on, but deny that the said note remains due and unpaid, as alleged, but that said note consists partly of usurious interest, as hereinafter stated; and defendants aver that said note is subject to certain credits, payments, offsets, demands, and deductions for usury, as hereinafter set forth.

Defendants state that at the time of the execution of said note — all notes preceding it, of which it is a renewal and consolidation, usury was knowingly charged and reserved and is now left in said note, and that at each and during all said loans and extensions the plaintiff was and is a banking corporation, duly incorporated as a national bank under the laws of the United States and subject to the statutes of the United States and the State of Missouri regulating and governing national banks.

Defendants state that S. A. Haseltine and S. C. Haseltine are principals upon said note sued on and upon all notes executed of which it is a renewal note, and that the other defendants are and were only their securities on said notes.

9 And, further answering, defendants say that on the 27th day of June, 1891, defendants S. A. and S. C. Haseltine borrowed of the plaintiff the sum of eight hundred dollars for the period of thirty days, and upon said loan the plaintiff knowingly and usuriously charged and reserved discount in advance to the amount of seven and $\frac{30}{100}$ dollars, which is above and more than the legal rate allowed by the laws of this State.

And, further, defendants say that on July 27th, 1891, defendants borrowed of plaintiffs $100 for 90 days, and therefor plaintiff charged and reserved and received discount in advance in the sum of $3.30, which plaintiff knowingly and usuriously kept from defendant-.

And, further, on July 30th, 1891, said note, nominally for $800, was renewed for 30 days, and plaintiff charged and reserved and received discount to the amount of $9.30, which was knowingly and usuriously done.

And on Sept. 11th, 1891, said defendant- had said note nominally for $800 renewed for 120 days, and plaintiff usuriously and knowingly charged and reserved from the amount so extended or renewed the sum of $27.30.

And on October 28th, 1891, they renewed said nominal amount of $100 and borrowed $125 additional for 60 days, and for the same the plaintiff knowingly and usuriously charged and reserved and received from said sum the sum of $3.66.

And on Dec. 30th, 1891, said note, nominally for $225, was renewed for 60 days, and plaintiff knowingly and usuriously charged and reserved and received discount to the amount of $3.66.

And on Jan. 4th, 1892, defendants borrowed an additional sum of plaintiff for 60 days and gave a note nominally for $500, but plaintiff knowingly and usuriously charged and reserved and received the sum of $8.70.

And on Jan. 12, 1892, the nominal amount of $800 was renewed for 120 days, for which plaintiff knowingly and usuriously charged and reserved and received from the amount extended $27.30.

And on March 2nd, 1892, the nominal amount of $225 was renewed for 90 days, for which plaintiff knowingly and usuriously charged and reserved and received the sum of $5.85.

And on March 5th, 1892, the defendant- borrowed on additional sum of money for 60 days and gave their note nominally for $250, but did not receive said sum, but plaintiff knowingly and usuriously charged and reserved and received the sum of $4.35.

And on March 7th, 1892, the said note, nominally for $500, was renewed for 60 days, and plaintiff knowingly and usuriously charged and reserved and received from the amount extended the sum of $8.70.

And on July 6th, 1892, the said note, nominally for $800, was renewed for 30 days, and plaintiff knowingly and usuriously charged and received and reserved from the amount extended discount to the sum of $7.30.

And on July 18th, 1892, the said note, nominally for $225, was renewed for 30 days, and plaintiff knowingly and usuriously charged and reserved and received from the amount extended the sum of $2.05.

And on Aug. 1st, 1892, the said note, nominally for $800, was extended for 30 days, and plaintiff knowingly and usuriously charged and reserved and received from the amount extended the sum of $7.30.

And on Aug. 20th, 1892, the said note, nominally for $225, was

extended for 60 days, and plaintiff knowingly and usuriously
11 charged and reserved and received from the amount extended the sum of $3.30.

And on Oct. 13th, 1892, the said note, nominally for $800, was renewed for 60 days, and plaintiff knowingly and usuriously charged and reserved and received from the amount renewed the sum of $13.95.

And on October 17th, 1892, the said note, nominally for $225, was partly paid, defendants paying the sum of $25 and renewed a nominal sum of $200 for 30 days, on which plaintiff knowingly and usuriously charged and reserved and received the sum of $3.50.

And on December 15th, 1892, the said nominal sum of $800 was renewed for 60 days, and plaintiff knowingly and usuriously charged and reserved and received the sum of $13.95.

And on the 16th day of January, 1893, the defendant made a note to the plaintiff for $340, due in 60 days, on which the plaintiff charged and reserved and received the sum of $5.95.

And on Jan. 23rd, 1893, the said note, nominally for $200, was renewed for 60 days, and the plaintiff knowingly and usuriously charged and reserved and received from the sum extended the sum of $3.50.

And on Jan. 28th, 1893, the note, nominally for $500, was renewed for 90 days, and plaintiff knowingly and usuriously charged and reserved and received from the amount extended the sum of $12.80.

And on Feb. 16th, 1893, the said note, nominally for $800, was renewed for 90 days, and the plaintiff knowingly and usuriously charged and reserved and received from the amount extended the sum of $20.65.

12 And on March 20th, 1893, the said note, nominally for $340, was extended for 90 days, and the plaintiff knowingly and usuriously charged and reserved and received the sum of $7.80.

And on March 25th, 1893, the said note, nominally for $200, was extended 90 days, and plaintiff knowingly and usuriously charged and reserved and received the sum from said extension of $5.15.

And on May 2nd, 1893, the said note, nominally for $500, was renewed for 90 days, and the plaintiff knowingly and usuriously charged and received the sum of $12.00.

And on May 29th, 1893, the defendants borrowed money of the plaintiff and gave their note therefor for the sum of $600 for 90 days, and the plaintiff knowingly and usuriously charged and reserved and received the sum of $15.50 from said borrowers.

And on May 2nd, 1893, the said note, nominally for $800, was renewed for 90 days, and plaintiff knowingly and usuriously charged and reserved and received the sum of $20.65 from said sum extended.

And on June 30th, 1893, the said note, nominally for $200, was renewed for 90 days, and plaintiff knowingly and usuriously charged and reserved and received the sum of $7.80.

And on June 26th, 1893, the said note, nominally for $200, was

renewed for 90 days, and plaintiff knowingly and usuriously charged and reserved and received the sum of $5.05.

And on Aug. 3rd, 1893, the said note, nominally for $500, was changed to four hundred (400) dollars by a payment of $100 by defendants, and the $400 was extended by renewal for 90 days, and plaintiff knowingly and usuriously charged, reserved, and
13 received the sum of $10.30 from the amount extended.

And on Aug. 23rd, 1893, the said note, nominally for $800, was changed to $700 by a payment of $100 by the defendants, and the renewal note was made for $700 for 90 days, and plaintiff knowingly and usuriously charged and reserved and received the sum of $18.55.

And on Oct. 14th, 1893, the said note-, nominally for $200, $340, and $600 and $400, were united in one note, nominally for the sum of $1,540, which was extended for 60 days, and plaintiff knowingly and usuriously charged and reserved and received the sum of $26.95 from the amount so extended.

And on Nov. 4th, 1893, the note, nominally for $700, was extended 120 days, and plaintiff knowingly and usuriously charged and reserved and received the sum of $24.90.

And on Dec. 16th, 1893, the said note, nominally for $1,540, was extended 60 days, and the plaintiff knowingly and usuriously charged and reserved and received the sum of $26.95.

And on Feb. 17th, 1894, the said note, nominally for $1,540, was renewed for 60 days, and the plaintiff knowingly and usuriously charged and reserved and received the sum of $26.95.

And on March 26th, 1894, the said note, nominally for $700, was extended for 90 days, and the plaintiff knowingly and usuriously charged and reserved and received the sum of $18.00.

And on April 24th, 1894, the said note, nominally for $1,540, was renewed for 60 days, and the plaintiff knowingly and usuriously charged and reserved and received the sum of $26.95.

And on June 20th, 1894, the said notes, nominally for $1,540 and $700, were united, and a note, nominally for $2,240, was renewed for 60 days, and plaintiff knowingly and usuriously charged and reserved and received the sum of $31.35.

14 And on Aug. 27th, 1894, the said note, nominally for $2,240, was extended 60 days, and plaintiff knowingly and usuriously charged and reserved and received usurious interest in the sum of $39.35.

And on Oct. 29th, 1894, the said note, nominally for $2,240, was extended for 90 days, and plaintiff knowingly and usuriously charged and reserved and received the sum of $46.30.

And defendants say that the legal rate of interest in the State of Missouri is and has been during all this time of the making and renewing of the above notes only eight per cent. (8 %) per annum, and that plaintiff knowingly and usuriously charged and reserved and received a greater rate at the making and renewing and extending of each and all of the said notes, in violation of the laws of the State of Missouri and the laws of the United States.

And defendants say that the note sued upon, which is nominally

for $2,240, is largely for usury charged and reserved by the plaintiff, as above set forth, and the whole amount of money charged as discount should be declared forfeited and the plaintiff should have judgment for the principal of said note, and only after deducting the $850 discount above set forth.

Defendants say that the said note sued on is not for money borrowed alone, but consists partly of usury, which is to the amount of $850, which should be deducted from the said note.

And defendants say that the investigation of the defendant's charge of usury charged and reserved involves a long line of accounts, as above set forth, which require many calculations and computations and should be referred to a referee.

Defendants therefore ask that a referee be appointed by this honorable court to fully investigate and report the facts, and with full power to take evidence and report the same as in such cases
15 made and provided, and that defendant- be allowed to deduct the usury from said note sued upon, and for other proper relief.

GEO. S. RATHBUN &
S. A. HASELTINE,
Att'ys for Def'ts.

And on back of said amended answer is the following endorsement, to wit:

Filed Feb. 4th, 1897. J. M. Yarbrough, clerk.

In the Circuit Court of Greene County and State of Missouri, January Term, 1897.

THE CENTRAL NATIONAL BANK, a Corporation, Plaintiff,
vs.
S. A. HASELTINE, S. C. HASELTINE, S. I. HASELTINE, and L. K. Haseltine, Defendants.

Be it remembered that upon the trial of this cause, the same being submitted to this court and a jury waived and said cause coming on to be heard before the Honorable James T. Neville, judge, the following proceedings were had, to wit:

C. W. Hamlin, having been by consent of the parties duly appointed by the court in said cause as referee to find the facts upon the matters submitted to him by the order of said court making his appointment, on this 13th day of March, 1897, submits and files in court his said report and the evidence taken before him in
16 said cause; which report and evidence *was* taken and made in pursuance of said order of court and is as follows:

CENTRAL NATIONAL BANK }
vs.
S. A. HASELTINE ET AL. }

To the honorable court of Greene Co., Missouri:

Having been appointed referee in the above-entitled cause to take testimony and make findings in accordance with the following instructions, to wit:

First. The referee will ascertain how much cash was actually paid or furnished to said defendants or any of them by plaintiff bank of the said sum of $2,240 of the note sued on.

Second. How much interest was reserved or taken out of said loans or discounts set out in defendants' answer and the plaintiff's petition, if any, at the time said respective loans were made.

Third. How much interest of the items of interest or discount set out in defendants' answer and plaintiff's petition was paid by the defendants to said bank, including the amount reserved out of said loans at the time the same were made.

Fourth. The referee will ascertain the entire amount of discount and interest severally charged by the bank in all of the extensions, consolidations, and payments from the time of said loans down to and including the notes sued on.

Fifth. The referee will find all the facts and report his findings to the court.

I beg to submit the following report:

I find there were a number of notes given prior to June 25, 1894, which entered into and being consolidated constitute the notes of date June 25, 1894, for $2,240. I find there was reserved out of the notes which constitute the note now in controversy, at the
17 time the loans were made, the sum of $40.65.

I further find that there *was* paid cash discounts at the date of the several renewals of the notes which constitutes the $2,240 note, as well as the renewal of said note *was* executed, down to Oct. 24, 1894, exclusive of the amounts reserved out of the notes at the time they were originally given, the sum of $566.70, which cash discounts were paid in advance at the date of the several renewals.

I further find that the amounts of discounts and interest severally charged by the bank in all as original loans, the extensions, consolidations, and payments on extensions during the time of said loans down to and including the notes sued on *was* $947.50.

I further find that defendants actually received out of the note, June 25, 1894, of $2,240, or rather out of the note constituting that note, in cash the sum of $2,199.35, making the amount reserved out of the loans at the time they were made $40.65; that the balance of the $947.50 above stated was money paid in cash by defendants to said bank at the dates of the several renewals of all the notes which constitute the one in controversy, as well as also including the moneys paid at the dates of the several renewals on said note.

I further find that it is admitted by the parties to this — that the amount of interest or discount charged by the plaintiff and paid by defendants was in excess of eight per cent. interest.

I also find that the first note given to plaintiff by defendants bore date of July 27, 1891. This note was for $800. The next loan was of the same date, to wit, July 27, 1891, for $100. The next
18 was Oct. 28, 1891; the next, dated Jan. 24, 1892, for $500. The next note was of $250, of date March 5, 1892, and which note was subsequently paid off and did not enter into this note in controversy; consequently is not taken into consideration in this report. The next loan was on the 16th day of Jan., 1893, which amounted to $340. The next was a loan, of date May 29, 1893, for $600. These several notes, upon one of which had been made a payment and credited $100, constitute the note in controversy in this case, and it was at the time of the making originally of the notes above mentioned that the discount of $40.65 was reserved out, the defendants receiving the amount of the notes less the amount reserved, as above specified.

The cash interest or discount paid at the time of the several renewals were as follows:

1st	payment,	made	July	30, 1891,	$9.30;	renewal of		$800	note	for	30 da.
2nd	"	"	Sept.	11, 1891,	27.30;	"	"	800	note	for	120 da.
3rd	"	"	Dec.	30, 1891,	3.60;	"	"	225	"	"	60 "
4th	"	"	Jan.	12, 1892,	27.30;	"	"	800	"	"	120 "
5th	"	"	Mar.	2, 1892,	5.85;	"	"	225	"	"	90 "
6th	"	"	Mar.	7, 1892,	8.70;	"	"	500	"	"	60 "
7th	"	"	May	6, 1892,	13.95;	"	"	800	"	"	60 "
8th	"	"	July	6, 1892,	7.30;	"	"	800	"	"	30 "
10th	"	"	Aug.	16, 1892,	2.05;	"	"	225	"	"	30 "
11th	"	"	Aug.	29, 1892,	3.30;	"	"	800	"	"	60 "
12th	"	"	Oct.	13, 1892,	13.95;	"	"	800	"	"	60 "
14th	"	"	Dec.	15, 1892,	13.95;	"	"	800	"	"	60 "
15th	"	"	Jan.	23, 1893,	3.50;	"	"	200	"	"	60 "
16th	"	"	Jan.	28, 1893,	12.80;	"	"	500	"	"	90 "
17th	"	"	Feb.	16, 1893,	20.65;	"	"	800	"	"	90 "
18th	"	"	Mar.	20, 1893,	5.80;	"	"	340	"	"	90 "

19

19th	payment,	made	Mar.	20, 1893,	$5.15;	renewal of		$200	note	for	90 da.
20th	"	"	May	2, 1893,	12.80;	"	"	500	"	"	90 "
21st	"	"	May	2, 1893,	20.65;	"	"	800	"	"	90 "
22nd	"	"	June	30, 1893,	7.80;	"	"	340	"	"	90 "
23rd	"	"	June	26, 1893,	5.05;	"	"	200	"	"	90 "
24th	"	"	Aug.	3, 1893,	10.30;	"	"	400	"	"	90 "
25th	"	"	Aug.	23, 1893,	18.55;	"	"	700	"	"	90 "
26th	"	"	Oct.	24, 1893,	26.95;	"	"	1,540	"	"	60 "
27th	"	"	Nov.	4, 1894,	24.20;	"	"	700	"	"	120 "
28th	"	"	Dec.	16, 1893,	26.95;	"	"	1,540	"	"	60 "
29th	"	"	Feb.	17, 1894,	26.95;	"	"	1,540	"	"	60 "
30th	"	"	Mar.	6, 1894,	18.00;	"	"	700	"	"	90 "
31st	"	"	Apr.	24, 1894,	26.95;	"	"	1,540	"	"	60 "
32nd	"	"	June	20, 1894,	31.35;	"	"	2,240	"	"	60 "
33rd	"	"	Aug.	27, 1894,	39.35;	"	"	2,240	"	"	60 "
34th	"	"	Oct.	29, 1894,	46.30;	"	"	2,240	"	"	90 "
35th	"	"	Jan.	30, 1895,	39.20;	"	"	2,240	"	"	60 "
36th	"	"	Apr.	17, 1895,	39.20;	"	"	2,240	"	"	60 "
37th	"	"	June	5, 1895,	30.20;	"	"	2,240	"	"	60 "
38th	"	"	Aug.	7, 1895,	39.20;	"	"	2,240	"	"	60 "
39th	"	"	Oct.	9, 1895,	39.20;	"	"	2,240	"	"	60 "
40th	"	"	Dec.	11, 1895,	57.85;	"	"	2,240	"	"	60 "
41st	"	"	Mar.	13, 1896,	57.85;	"	"	2,240	"	"	90 "
42nd	"	"	June	14, 1896,	57.85;	"	"	2,240	"	"	90 "
9th	"	"	July	18, 1892,	7.30;	"	"	800	"	"	60 "

Making aggregate payments of $906.85.

This seeming discrepancy in the notes given I account for in the consolidation and partial payments of the notes originally given, and some of the payments, the dates of which do not seem to
20 correspond exactly with the proper dates of payments or renewals of the notes for the time it had run, are explained in the fact that the notes were not always renewed on the day when they fell due.

The foregoing tabulated statement of the amounts of interest or discount paid on the different notes at the different times I gave as a summary of the entire amount paid from the date of the first loan down to and including the last payment made on the note in controversy. However, in this case defendants in their answer are only asking credit for the payment down to and including October 29th, 1894, which aggregate the sum of $540.40.

The costs incurred before me constitutes only the charges of the stenographer, Miss Alice T. Barrett, whose bill is hereto attached, amounting to $4.50, and whatever may be taxed in favor of the referee, which he thinks is reasonably worth $25.00.

All of which is respectfully submitted, with the testimony taken before me, for the consideration and action of the court.

C. M. HAMLIN, *Referee.*

And which report is based upon the following evidence, to wit:

CENTRAL NATIONAL BANK }
vs.
S. A. HASELTINE ET AL. }

Deposition Taken Before Hon. C. W. Hamlin, as Referee, at his Office, in the City of Springfield, on the 8th Day of Feb., A. D. 1897.

S. A. HASELTINE, being produced and sworn, upon his oath testified as follows:

By Mr. RATHBUN: Go on and state the fact in relation to
21 this matter.

A. The discount on the $800 note *was* given on the 27th day of June, 1891, amounting to $7.30 was reserved out of the $800 face of the note. (It is admitted that the rate of interest charged was in excess of eight per cent. interest.) The next one that was reserved out was on July 27, 1891, on a loan of one hundred dollars for ninety days, when $3.30 was paid, the note being made for that amount more than the amount of money furnished.

The next was on Oct. 28th, 1891, when $3.60 was reserved out of the note again.

By Mr. HAMLIN: You mean that the note was given for $3.66 more than was due at this time?

A. No; that amount of money was reserved out of the face of the note. They furnished us the face of the note less that amount of money, which was ten per cent. on the amount of the loan for the time that

it ran, and on Jan. 4, 1892, defendant made another loan for $500 for sixty days, which is a part of the $2,240 note, and these various notes above mentioned were also a part of the $2,240 note, and at that time the bank reserved out of the $500, out of the face of the note, $8.70; and the next was on Mar. 5, 1892. There was $250 note. This was subsequently paid off. This note did not enter into the $2,240 note. At that time was reserved out $4.35 of the amount furnished the defendant from the face of the note.

The next was on the 16th day of Jan., 1893, when the defendants borrowed $340 for sixty days; $5.95 was then reserved out of the amount of money as shown by the face of the note. This also entered into the $2,240, the one sued on. Next loan was May 29, 1893, for ninety days, and the plaintiff reserved out of the amount furnished the defendants, as shown by the face of the not-, $15.50. This was a $600 note. That was also a part of the $2,240 note sued on.

22

All these other extensions of the several notes and their consolidation and the interest was paid at the rate of 10%. These amounts mentioned as reserved are discounts taken out of the original loans. All the other items of discount alleged in the answer to have been paid are items for money actually paid by the defendants at the time said discount was made and for the purpose of the discount, as alleged in said answer, and which apppears as follows.

All of the payments in the answer and all of the discounts were upon notes which entered into the $2,240 note, with the exception of one payment of $4.35 discount on the $250 note of March 5, 1892.

The following were paid at the time the notes were renewed:

1st	payment,	made	July	30, 1891,	$9.30;	renewal of		$800	note	for	30 da.
2nd	"	"	Sept.	11, 1891,	27.50;	"	"	800	"	"	120 "
3rd	"	"	Dec.	30, 1891,	3.60;	"	"	225	"	"	60 "
4th	"	"	Jan.	12, 1892,	27.30;	"	"	800	"	"	120 "
5th	"	"	Mar.	2, 1892,	5.85;	"	"	225	"	"	90 "
6th	"	"	Mar.	7, 1892,	8.70;	"	"	500	"	"	60 "
7th	"	"	May	6, 1892,	13.95;	"	"	800	"	"	60 "
8th	"	"	July	6th, 1892,	7.30;	"	"	800	"	"	30 "
9th	"	"	July	17, 1892,	2.05;	"	"	225	"	"	30 "
10th	"	"	Aug.	8, 1892,	7.30;	"	"	800	"	"	30 "
11th	"	"	Aug.	20, 1892,	3.30;	"	"	225	"	"	60 "
12th	"	"	Oct.	13, 1892,	13.95;	"	"	800	"	"	60 "
13th	"	"	Oct.	27, 1892,	3.50;	"	"	200	"	"	30 "
14th	"	"	Dec.	15, 1892,	13.95;	"	"	800	"	"	60 "

23

15th	"	"	Jan.	23, 1893,	3.50;	"	"	200	"	"	60 "
16th	"	"	Jan.	23, 1893,	12.80;	"	"	500	"	"	90 "
17th	"	"	Feb.	16, 1893,	20.65;	"	"	800	"	"	90 "
18th	"	"	Mar.	20, 1893,	7.80;	"	"	340	"	"	90 "
19th	"	"	Mar.	20, 1893,	5.15;	"	"	200	"	"	90 "
20th	"	"	May	2, 1893,	12.80;	"	"	500	"	"	90 "
21st	"	"	May	2, 1893,	20.65;	"	"	800	"	"	90 "
22nd	"	"	June	30, 1893,	7.80;	"	"	340	"	"	90 "
23rd	"	"	June	26, 1893,	5.05;	"	"	200	"	"	90 "
24th	"	"	Aug.	3, 1893,	10.30;	"	"	400	"	"	90 "
25th	"	"	Aug.	23, 1893,	18.55;	"	"	700	"	"	90 "
26th	"	"	Oct.	14, 1893,	26.95;	"	"	1,540	"	"	60 "
27th	"	"	Nov.	4, 1893,	24.20;	"	"	700	"	"	120 "

28th	payment,	made	Dec.	16,	1893,	26 95;	renewal of	$1,540	note	for	60 da.
29th	"	"	Feb.	17,	1894,	26.95;	" "	1,540	"	"	60 "
30th	"	"	Mar.	26,	1894,	18.00;	" "	700	"	"	90 "
31st	"	"	Apr.	24,	1894,	26.95;	" "	1,540	"	"	60 "
32nd	"	"	June	30,	1894,	31.35;	" "	2,240	"	"	60 "
33rd	"	"	Aug.	27,	1894,	39.35;	" "	2,240	"	"	60 "
34th	"	"	Oct.	29,	1894,	46.30;	" "	2,240	"	"	90 "

Payment 34 is also included in the other petition.

By Mr. RATHBUN:

Q. Well, now, Mr. Haseltine, at the time of the payment of these interests that you have spoken of, to whom were those payments made and where, at the bank?

A. Yes, sir; they were made at the bank, to Joseph Sheppard as cashier.

Q. What was said in relation to the amount of interest you were paying?

24 A. When the new law went into effect, in June, 1891, I told Mr. Sheppard, cashier of the Central national bank at that time, that my brother was getting the benefit of the eight per cent. law at the Greene County bank, and asked him to do the same with us there, and he said he could not afford to do so, because we were not carrying enough deposits with them.

Q. What was the amount charged you in the way of interest that was retained from the amounts you have spoken of—for interest and discount on those notes?

A. All but two different times it was ten per cent. upon the face of the note, in advance. Two different times, as shown by the figures, it was 8 % on the face of the note, which also includes 8 % on the discount included in the note when it was originally made of 10 %.

Q. When was the first reservation made of any part or portion of the money that was loaned you that was included in the first note?

A. In July, 1891.

Q. Then the entire amount was not paid to you? A part was kept out as interest?

A. Yes, sir.

Q. You did not receive the whole amount of the note?

A. No, sir.

Q. That was the first?

A. That was the first; yes, sir.

Cross-examination by B. U. MASSEY:

Q. Then the amount, Mr. Haseltine, that was reserved and retained out of the loan, which afterwards constituted this $2,240, were: First, $7.30, made July 27, 1891; next, $8.70, January 4, 1892; next, $3.30, retained same day (July 27, 1891); next,

25 $5.85, January 16, 1893, and $15.50, May 29, 1893. Are those correct?

A. Yes, sir.

Q. And this aggregate- the sum of what?

A. $40 95.

Q. Then the total amount of the money that you actually received from the bank of the money embraced in this one note of $2,240 was $2,199.35?

A. Yes, sir.

Q. The principal of this $2,240 still remains due and unpaid, unless paid by penalties sued for and offsets in this claim?

A. Yes, sir.

Which was all of the evidence offered before the referee and constitutes all the evidence in said cause; and, no objections being made to the report and finding of the referee, and no other evidence offered by either party, defendants asked the court to declare the law to be:

I. If the court finds from the evidence that in making the original loan to the defendants, and that the note sued on embraces in whole or in part said original notes and money loaned to the defendants, and that plaintiff charged and reserved from the defendants usurious interest upon said renewal notes and knowingly charged and demanded the defendants to pay such usurious interest, then the court declares the law to be that in this suit plaintiff can only recover the money actually loaned and paid to the defendants, less the entire amount of interest so paid by the defendants to the plaintiff.

II. If the court finds from the evidence that the taint of usury is attached to the original note, and that the note sued on
26 is but one of the renewal notes embracing, in whole or in part, said original note, and that usurious interest of more than 8 %, eight per cent., was asked, demanded, reserved, or received by the plaintiff, and the same was paid by the defendants to plaintiff or embraced in said note, and that the same was knowingly done by the plaintiff, then the court declares that said taint of usury follows down through the whole of said renewals, and the court will find for the defendants and give *him* credit upon the note sued on for all the interest *he* has paid from the beginning.

III. The court finds from the referee's report that plaintiff charged and reserved and received on the note sued on and the notes which entered into it more than (8 %) eight per cent., the legal rate of interest in the State; that under the United States statute all interest was forfeited which the notes and their renewals bore or was carried with them, and therefore said payments are to be credited upon the amount which defendant owed the plaintiff, and plaintiff is entitled to the face amount of said note of $2,240, less the said credits and payments, which amount to $580, and the finding will be for the plaintiff for the said sum of $1,660.

Which declarations of law numbered 1, one, (2) two, and (3) three the court refused to give, and to which rofusal of the declarations thus prayed for the defendants then and there at the time excepted.

And thereupon the court, on the — day of March, 1897, rendered its finding and udgment for the plaintiff as follows (here copy judgment):,

Circuit Court, Greene County.

27 CENTRAL NATIONAL BANK, Plaintiff,
vs.
S. A. HASELTINE ET AL., Defendants.

NOTE.—Trial by court; verdict for plaintiff for $2,199.00.

Now, at this day, come above parties, plaintiff and defendants, by their respective attorneys, and this cause coming on to be heard the said parties announce ready for trial.

Thereupon, issue being joined and a jury waived by consent, this cause is submitted to the court for hearing, and the court proceeds to hear the evidence, and, all and singular the premises being seen and heard, the court finds the issues in favor of the plaintiff; and this being an action upon a certain instrument for the payment of money, to wit, a promissory note, whereby plaintiff's demand is ascertained, and the court doth assess the amount due and owing from the defendants to plaintiff on the instrument herein sued on at the sum of two thousand one hundred and ninety-nine dollars ($2,199) as debt and damages

It is therefore considered, adjudged, and ordered by the court that the plaintiff, Central National Bank, a corporation, have and recover of and from the defendants, S. A. Haseltine, S. C. Haseltine, L. K. Haseltine, and S. I. Haseltine, the sum of two thousand one hundred and ninety-nine dollars ($2,199) as debt and damages aforesaid assessed by the court, with interest thereon, at the rate of 8 % per annum, from this date until paid, together with all costs in this behalf laid out and expended, for which execution may issue.

And on the 13th day of March, 1897, and within four days after said finding and judgment, defendants filed their motion for a new trial and to set aside said judgment and finding, and which
28 said motion is as follows:

In the Circuit Court of Greene Co., January Term, 1897.

THE CENTRAL NATIONAL BANK, Plaintiff,
vs.
S. A. HASELTINE, S. C. HASELTINE, S. I. HASELTINE, & L. K. Haseltine, Defendants.

Now come defendants and ask the court to set aside the verdict and judgment and grant a new trial in the above cause for the following reasons, to wit:

1st. Because the finding is against the evidence.

2nd. Because the finding is against the law and the evidence.

3rd. The court erred in refusing the declarations of law as asked by the defendants.

4th. Upon the law and the evidence, the judgment should have been for the defendants.

5th. The first transaction upon the note sued on being usurious and the evidence showing that plaintiff, a national bank, asked, demanded, received, and reserved usurious interest, the entire inter-

est was forfeited, and all payments should have been credited upon the note in suit, and the court erred in refusing to so apply said credits.

RATHBUN & SON & HASE-TINE,
Att'ys for Defendants.

29 And which said motion the court, on the — day of March, 1897, overruled, and to which ruling and order of the court in overruling said motion the defendants then and there at the time excepted.

And thereupon defendants filed their affidavit and bond for an appeal, which is granted and by order of the court, of record, time for filing bill of exceptions extended to the first day of the next May term of this court, 1897. And that the above matters and things, rulings and exceptions, may be made a part of the record, defendants tender this their bill of exceptions, and pray that the same may be signed and sealed as such, which is accordingly done this 5th day of April, 1897.

JAMES T. NEVILLE. [SEAL.]

And on the back of said bill of exceptions is the following endorsements, to wit:

Filed April 5, 1897. J. M. Yarbrough, clerk.

STATE OF MISSOURI, } *ss:*
County of Greene, }

I, J. M. Yarbrough, clerk of the circuit court within and for the county and State aforesaid, do hereby certify that the above and foregoing is a full, true, and complete transcript of the record and proceedings had in our Greene county circuit court in the above-entitled cause as fully as same appears of record and on file in my office, as required by law.

[SEAL.] In testimony whereof I have hereunto set my hand as clerk of the circuit court and affixed the seal thereof.

30 Done at office, in the city of Springfield, Missouri, this 11th day of June, A. D. 1897.

J. M. YARBROUGH, *Cir. Clerk.*

And afterwards, to wit, on the 13th day of January, 1900, the further following proceedings were had in said cause, viz:

CENT. NAT. BANK, Resp., }
vs. }
S. A. HASELTINE ET AL., App. }

Come now the said parties, by attorneys, and after argument herein submit these causes to the court.

And afterwards, to wit, on the 20th day of February, 1900, the further following proceedings were had in said cause, viz:

CENTRAL NATIONAL BANK, a Corporation, Respondent,
vs.
S. A. HASELTINE, S. C. HASELTINE, S. I. Haseltine, and L. K. Haseltine, Appellants.
} Transferred from St. Louis Court of Appeals.

Now, at this day, come again the parties aforesaid, by their respective attorneys, and the court here, being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid in form aforesaid by the said Greene county circuit court rendered, be in all things affirmed and stand in full force and effect, and that the said respondent recover against the said appellants its costs and charges herein expended and have therefor execution. (Opinion filed.)

31 Which said opinion is in words and figures as follows, to wit:

In the Supreme Court of Missouri, October Term, 1899, Division No. 1.

THE CENTRAL NATIONAL BANK, Respondent,
vs.
S. A. HASELTINE ET AL., Appellants.
} No. 9037.

This cause was transferred to this court by the St. Louis court of appeals, on the ground that an authority exercised under the United States is drawn in question, and hence this court has jurisdiction under section 12, art. VI, of the Constitution.

The controversy is this: The plaintiff, a national bank organized under the laws of the United States, sues the defendants on a promissory note for $2,240. The defendants admit the execution of the note, but claim certain credits and set-offs, arising out of the fact that the note sued on is the consolidation of various smaller notes, which had matured before the execution of this note, and that the defendants had paid to the plaintiff, within two years before the execution of this note, upon such other notes and upon this note usurious interest, aggregating $580, which sum they asked to have deducted from the principal sum of $2,240 represented by this note, thereby reducing the plaintiff's claim to $1,660.

The trial court referred the case to a referee to ascertain how much cash the plaintiff paid the defendants on the note sued on, how much interest had been reserved or taken out of all the notes, and

32 how much interest was paid in cash by defendants not reserved. The referee found that defendants had received on this note of $2,240 the sum of $2,199.35; that the interest reserved by the plaintiff out of this note was $40.65; "that there had been paid by defendants, as cash discounts on said loans, up to October 24th, 1895, the sum of $566.70; that the whole amount of interest paid and deducted by the bank on all of said loans from the beginning to the end was $947.50; that these payments were made in excess of the legal rate for said loan." Thereupon the court entered judgment for the plaintiff for $2,199.35, that being the face of the

note sued on after deducting the discount of $40.65, reserved when the note was executed.

Defendants appealed.

I.

Formerly it was the rule in Missouri that "one who voluntarily pays unlawful interest upon a usurious contract cannot recover it by suit." Ransom *v.* Hayes, 39 Mo., 445; Rutherford *v.* Williams, 42 Mo., 18; Ferguson *v.* Soden, 111 Mo., 208. Nor could usurious interest once paid be applied as credits upon the note when it was sued on. Perrine *v.* Poulson, 53 Mo., 309; Kirkpatrick *v.* Smith, 55 Mo., 389. And the principal, with legal interest, could be recovered, notwithstanding the usurious payment. Of course, if the usurious interest had not been actually paid, but only promised, the courts would not enforce the unlawful promise and would render judgment only for the principal, with lawful interest.

This was the law until the act of November 20th, 1855 (R. S. 1855, ch. 85, sec. 5, p. 890), when it was enacted that in a suit upon a note, bond, or agreement the defendant might show by answer that
33 a greater rate of interest than ten per cent. "was therein or thereby agreed for or received or taken," and if the proof sustained the allegation the court should render judgment for the principal, with ten per cent. interest, but that the interest should go to the school fund and the defendant should recover his costs.

This same provision was carried into the revision of 1865 (R. S. 1865, ch. 89, sec. 5, p. 401), and into the revision of 1879 (R. S. 1879, ch. 41, sec. 2727, p. 459), and into the revision of 1889 (R. S. 1889, ch. 90, sec. 5976, p. 1429).

The act of April 23d, 1891 (Acts 1891, p. 170), amended section 5976, R. S. 1889, only so far as to reduce the legal rate of interest for which a party might contract from ten per cent. to eight per cent; but by the act of April 21st, 1891 (Acts 1891, p. 170), it was provided by section 1 thereof as follows:

"Usury may be pleaded as a defense in civil actions in the courts of this State, and upon proof that usurious interest has been paid, the same, in excess of the legal rate of interest, shall be deemed payment, shall be credited upon the principal debt, and all the costs of the action shall be taxed against the party guilty of exacting usurious interest, who shall in no case recover judgment for more than the amount found due upon the principal debt, with interest, after deducting therefrom all payments of usurious interest made by the debtor, whether paid as commissions or brokerage, or as payment upon the principal, or as interest on said indebtedness."

Under this statute, therefore, the usurious interest paid can be set off or credited on the principal when the lender sues—that is, the statute permits this to be done only as a defense to or part payment of the debt. It does not give the borrower a right to sue for
34 and recover usurious interest already paid. In this respect the law is the same that it was before this statute was enacted. If this State statute governed in this case, the defendants would be entitled to the credits they claim.

But the plaintiff is a national bank, and therefore the statute of the United States controls the rights of the parties, and the State statute must yield. This was expressly so decided by the Supreme Court of the United States in Farmers', etc., National Bank *v.* Dearing, 91 U. S., 1, c. 33, where Mr. Justice Swayne, delivering the opinion of the court, said:

"The national banks organized under the act" (act June 3d, 1864, now chapter 3, title LXII, R. S. U. — 1878, p. 1003) "are instruments designed to be used to aid the Government in the administration of an important branch of the public service. They are means appropriate to that end. Of the degree of necessity which existed for creating them, Congress is the sole judge. Being such means, brought into existence for this purpose, and intended to be so employed, the States can exercise no control over them, nor in anywise affect their operation, except in so far as Congress may see proper to permit. Anything beyond this is 'an abuse, because it is the usurpation of power which a single State cannot give.' Against the national will 'the States have no power, by taxation or otherwise, to retard, impede, burthen, or in any manner control the operation of the constitutional laws enacted by Congress to carry into execution the power vested in the General Government.' * * * Whenever the will of the nation intervenes exclusively in this class of cases the authority of the State retires and lies in abeyance until a proper occasion for its exercise shall recur."

The impelling reason that called for this conclusion was
35 pointed out to be that the usury statutes of the several States differed widely, some forfeiting only the excess of interest, some the whole interest, and some the debt or demand as well as the interest, and it was held that Congress did not intend to permit such different consequences to flow from a violation of the Federal statute.

The section of the act of 1864 under consideration in that case has since been divided and is now sections 5197 and 5198, R. S. U. S. 1878. By section 5197 national banks are permitted to charge the same rate of interest as is lawful in the States in which they are located, and if no rate is so prescribed, then they can charge seven per cent.

Section 5198 provides that knowingly taking, receiving, reserving, or charging a greater rate of interest than section 5197 permits shall be deemed a forfeiture of the entire interest, and in case such usurious interest is paid the person paying it may "recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same, provided such action is commenced within two years from the time the usurious transaction occurred."

At first it was held that the usurious interest, if paid, could be set off or allowed as a credit upon the principal when suit was brought to collect the principal, or it could be recovered in an independent action. National Bank of Madison *v.* Davis (U. S. circuit court, Indiana), 6 Central L. J., 106; Snyder *v.* Mt. Sterling National Bank (court appeals Ky.), 21 S. W., 1050; First National Bank of Newton

v. Turner (court appeals Ks.), 42 Pacific Rep., 936; National Bank of Auburn *v.* Lewis, 75 N. Y., 516; Overholt *v.* National Bank,
36 82 Pa. St., 490; Moniteau National Bank *v.* Miller, 73 Mo., 187.

But the Supreme Court of the United States has since held that usurious interest once paid cannot, under the Federal statute, be set off or allowed as a credit on the principal of the debt, but that the remedy given by that statute to the person paying usury is to recover double the interest so paid by an independent action is exclusive. Barnet *v.* National Bank, 98 U. S. L. C., 558, 9; Driesbach *v.* National Bank, 104 U. S., 52; Stephens *v.* Monongahela Bank, 111 U. S., 197; Carter *v.* Caruse, 112 U. S., 478.

The case of Brown *v.* Marion National Bank, 169 U. S., 416, decides nothing to the contrary, for in that case the usurious interest was not paid, but was included in the face of the note, and it was simply held, as it has always been the law, that the court would not lend its aid to the lender to recover usurious interest.

In Driesbach *v.* National Bank, 104 U. S., 52, Mr. Chief Justice Wiatt calls attention to the fact that the supreme court of Pennsylvania in National Bank *v.* Gruber, 91 Pa. St., 377, followed Barnett *v.* National Bank, 98 U. S., 555, and overruled its former decisions (that usurious interest might be set off against the principal debt) in the cases of Lewis *v.* National Bank, 72 Pa. St., 228, and Oberholt *v.* National Bank, 82 Pa. St., 490.

The rule declared by the Supreme Court of the United States was followed in National Bank *v.* Childs, 133 Mass., 248; National Bank *v.* Moon, 83 Iowa, 1 c., 743; Highley *v.* National Bank, 26 Ohio St., 75. In other words, the Federal statute has created a new right of action, but has not given a right of set-off as to such matters, while the statute of Missouri gives a right of set-off, but not a right of action.

It follows that this court must, as in duty bound, follow
37 the decisions of the Supreme Court of the United States in construing this Federal statute, and that under those decisions these defendants cannot set-off or be allowed credit for the usurious interest paid, but that they are reverted to the exclusive remedy afforded by that statute, of instituting an independent action to recover such usurious interest, and that the judgment of the circuit court, which proceeded on these principles, is correct. It also follows that the case of Moniteau National Bank *v.* Miller, 73 Mo., 187, was erroneously decided, and it is therefore overruled.

The judgment of the circuit court is affirmed.

All concur.

W. C. MARSHALL, *J.*

And afterwards, to wit, on the 1st day of March, 1900, the further following proceedings were had in said cause, viz:

CENTRAL NATIONAL BANK, Resp.,
v.
S. A. HASELTINE ET AL., App.

Come now the said appellants, by attorney, and file their motion for rehearing herein.

Which said motion for rehearing is in words and figures as follows, to wit:

In the Supreme Court of Missouri, October Term, 1899, Division No. 1.

THE CENTRAL NATIONAL BANK, Respondent,
vs.
S. A. HASELTINE ET AL., Appellants. No. 9037.

38

Motion for Rehearing.

Now come appellants in the above-entitled case and ask the court to grant a rehearing of the same, and as grounds therefor say:

I.

The doctrine of the decision of the supreme court of Missouri in Moniteau Bank *v.* Miller, 73 Mo., 187, which is directly overruled by your honors in this case, is unwarranted by the subsequent decision and laws.

II.

Said decision is supported by the late statute of Missouri—act of April 21, 1891—all previous Missouri cases to the contrary.

So said decisions are no longer authority or law in Missouri. So similar decisions of New York, Minnesota, etc., have been annulled by similar statutes.

III.

Your honor's decision is in direct conflict with the case of Snyder *v.* Bank, 21 S. W. Rep. (Ky.), 1050, which case is directly in accord with the Missouri case of Moniteau National Bank *vs.* Miller, 73 Mo., 187, and said Kentucky case is directly affirmed by the Supreme Court of the United States in the case of Brown *vs.* Marion National Bank, 169 U. S., 416.

39

IV.

The court seems to have overlooked the fact that the case of The Moniteau National Bank *vs.* Miller, 73 Mo., 187, was decided after and referred to the case of The Barnett National Bank, 98 U. S., 555; and in view of the late case of Brown *vs.* Marion National Bank, 169 U. S., 416, the case at bar should be reversed and the credit should be applied on the principal.

Very respectfully,

GEO. S. RATHBUN.
S. H. HASELTINE.

And afterwards, to wit, on the 14th day of March, 1900, the further following proceedings were had in said cause, viz:

* * * * * * *

CENTRAL NATIONAL BANK, Respondent,
vs.
S. A. HASELTINE ET AL., Appellants.

Now, at this day, the court having fully considered and understood the motions heretofore filed for rehearing herein, doth order that said motions be, and the same are hereby, overruled.

And afterwards, on the 5th day of April, 1900, the further following proceedings were had in said cause, viz:

40 CENTRAL NATIONAL BANK, Respondent,
vs.
S. A. HASELTINE ET AL., Appellants.

Now, at this day, there is presented to the Honorable Theodore Brace, presiding judge of division No. 1 of the supreme court of the State of Missouri, in chambers, a writ of error to the Supreme Court of the United States, a citation directed to said respondent, citing and admonishing it to appear at a Supreme Court of the United States on the 5th day of May, 1900; an assignment of errors, and a bond in the sum of five thousand dollars; which said writ of error is allowed, said citation signed, and said bond approved, ordered filed, and made a part of the record herein.

Which said assignment of errors is in words and figures as follows, to wit:

In the Supreme Court of the United States, October Term, 1900.

THE CENTRAL NATIONAL BANK, Respondent in Error,
vs.
S. A. HASELTINE ET AL., Appellant- in Error.

Assignment of Error and Prayer for Reversal.

Now come appellants in error and state to your honor that errors have been committed by the supreme court of Missouri against the rights of your appellants, in this:

I.

41 Appellants were entitled to the rights of certain credits applied upon the note of respondent under the Revised Statutes of the United States of 1878, sec. 5198.

II.

Appellants are entitled to the said credits under the said United States statute, *and* construed by the Supreme Court of the United States in the case of Brown *vs.* Marion National Bank, 169 U. S., 416.

III.

That the decision against appellants is also against the statutes of Missouri, act of April 21st, 1891, page 170.

IV.

That the decision against appellants is also against the prior decisions of Missouri. See Moniteau National Bank *vs.* Miller, 73 Missouri, 187. Which last case was subsequent to the case of Barnett *vs.* National Bank, 98 U. S., 555, and is indirectly approved in the case of Brown *vs.* Marion National Bank, 169 U. S., 416.

V.

Said judgment is for 8 % interest, when the law of Missouri only provides for 6 % when no rate is agreed upon or, as in this case, where the rate is usurious and is forfeited.

Appellants ask that the judgment in the above-entitled case be reversed, and that appellants be permitted to have their joint and rightful claims.

S. A. HASELTINE &
GEO. S. RATHBUN,
Att'ys for Appellants.

42 And which said bond is in words and figures as follows, to wit:

UNITED STATES OF AMERICA, *sct:*

Know all men by these presents that we, S. A. Haseltine, S. C. Haseltine, S. I. Haseltine, and L. K. Haseltine, as principals, and Augusta Haseltine and G. A. H. Clark, as sureties, are held and firmly bound unto the Central National Bank of Springfield, Missouri, executors and administrators, in the sum of five thousand and no $_{100}$ dollars; to the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 19th day of March, A. D. 1900.

Upon this express condition, to wit: Whereas the above-named S. A. Haseltine, S. C. Haseltine, S. I. Haseltine, and L. K. Haseltine have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the cause above named by the supreme court of Missouri, division No. 1:

Now, if the above-named S. A. Haseltine, S. C. Haseltine, S. I. Haseltine, and L. K. Haseltine shall prosecute their said writ of error to effect and answer all damages and costs if they shall fail to make

good their plea, then this obligation to be void; otherwise to remain in full force and virtue.

S. A. HASELTINE. [SEAL.]
S. C. HASELTINE. [SEAL.]
L. K. HASELTINE. [SEAL.]
S. I. HASELTINE. [SEAL.]
G. A. H. CLARK. [SEAL.]
43 AUGUSTA HASELTINE. [SEAL.]

Signed and sealed in presence of—
REUBEN Y. THOMSON,
As to G. A. H. Clarke.

The above bond is hereby approved and ordered to be filed and made a part of the record.

THEO. BRACE, *Judge.*

The sureties herein having been examined and qualified by me, I hereby approve this obligation.

SARAH A. LATHAM,
U. S. Circuit Clerk,
[SEAL.] By REUBEN Y. JOHNSON, *D. C.*

UNITED STATES OF AMERICA, } ss:
Western District of Missouri, }

G. A. H. Clark, obligor in the within bond, being duly sworn, on her oath deposes and says that she resides as stated therein, and is worth, over and above all her debts and liabilities, the sum of fifteen thousand no $\frac{}{100}$ dollars, and that she owns real estate to that amount subject to execution in the State of Missouri.

G. A. H. CLARKE.

Subscribed and sworn to before me this 19th day of March, A. D. 1900.

SARAH A. LATHIM,
U. S. Clerk,
[L. S.] By REUBEN Y. THOMSON, *D. C.,*
Comm'r U. S. Cir. Court, Western Dist. of Mo.

UNITED STATES OF AMERICA, } ss:
Western District of Missouri, }

44 Augusta Haseltine, obligor in the within bond, being duly sworn, on her oath deposes and says that she resides as stated therein, and is worth, over and above all her debts and liabilities, the sum of seventy-five thousand no $\frac{}{100}$ dollars, and that she owns real estate to that amount subject to execution in the State of Missouri.

AUGUSTA HASELTINE.

Subscribed and sworn to before me this 19th day of March, A. D. 1900.

[L. S.]

SARAH A. LATHIM, *U. S. Clerk,*
By REUBEN Y. THOMSON, *D. C.,*
Comm'r U. S. Cir. Court, Western Dist. of Mo.

STATE OF MISSOURI, *ss:*

I, Jno. R. Green, clerk of the supreme court of the State of Missouri, certify that the foregoing is a full, true, and complete transcript of the record and proceedings in the cause entitled Central National Bank *vs.* S. A. Haseltine *et al.*, as fully and complete as the same appear- of record and on file in my said office.

Seal of the Supreme Court of Missouri.

In witness whereof I have hereunto set my hand as clerk and affixed the seal of said court. Done at office, in the city of Jefferson, this 16th day of April, A. D. 1900.

JNO. R. GREEN,
Clerk Supreme Court of Missouri.

Endorsed on cover: File No., 17,760. Missouri supreme court. Term No., 280. S. A. and S. C. Haseltine and S. I. and L. K. Haseltine, plaintiffs in error, *vs.* The Central National Bank of Springfield, Missouri. Filed May 12th, 1900.

APPELLANT'S BRIEF,

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No 280.

S A. AND S. C. HASELTINE AND S. I. AND L. K. HASELTINE, PLAINTIFFS IN ERROR,

vs.

THE CENTRAL NATIONAL BANK OF SPRINGFIELD, MISSOURI.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

JAMES BAKER,
Attorney for Appellants.

(17,760.)

INDEX.

Statement of the case, - - - - Page 1

Argument of errors, - - - - - " 2

Brief, - - - - - - - " 3

STATEMENT OF CASE.

This is a suit on a promissory note of $2240, executed by appellants to respondent National Bank of Springfield, Mo., part of appellants being principals and part securities upon said note. The note in suit, of $2240.00, as shown by the pleadings and referee's report in said cause, is a renewal note, and consolidation of five original notes, the first of which was for $500.00, given July 27th, 1891; the second of $100.00 of the same date; the third for $500.00, dated January 24th, 1892, and credited by $100.00 payment thereon; the fourth for $340.00, dated January 16th, 1893; the fifth and last was for $600.00 dated May 29th, 1893.

(There were other notes given and paid, but did not enter into the note in suit.)

The answer was a general denial, and special defense of usury in the original notes and partial payments as set up in the several counts thereof.

The court referred the case to C. H. Hamlin, as referee to hear the evidence and find the facts. To the report so made by him no exceptions were taken by either side. The referee found that there was originally reserved at the making of the original notes in suit the sum of $40.65 usurious interest which entered into the notes. The referee further found that there was $540.40 usurious interest charged and received by the said Bank at the renewals of the said notes entering into the one in suit, and upon the renewals of it prior to October 29th, 1894, the date to which credits are claimed from the making of the said notes. The payments sued for in the case of Haseltine vs. the Central Nat'l Bank, No. 279, not being included in this suit. All of said notes being usurious the highest contract rate of interest in Missouri is eight per cent; without contract it is only six per cent.

The court allowed the usury originally first charged, and reserved by the Bank at the making of the several notes entering into the one in controversy, amounting to $40.65 as a credit upon the note, but disallowed the $540.40 received subsequently upon

the same notes by the Bank at the several renewals of said $2240.-00 note, and those notes which entered into it, as set forth in the several counts in the answer, and as found by the referee, for which appellants ask credit and as partial payments on the ground of the first clause of section 5098, which forfeited all interest after the first usurious contract. Therefore left the partial payments to apply only on the principal debt.

Assignment of Error and Prayer for Reversal.

Now come appellants in error and state to your honor that errors have been committed by the supreme court of Missouri against the rights of your appellants, in this:

I.

Appellants were entitled to the rights of certain credits applied upon the note of respondent under the Revised Statutes of the United States of 1878, Sec. 5198.

II.

Appellants are entitled to the said credits under the said United States statute, as construed by the Supreme Court of the United States in the case of Brown vs. Marion National Bank, 169 U. S., 416.

III.

That the decision against appellants is also against the statutes of Missouri, act of April 21st, 1891, page 170.

IV.

That the decision against appellants is also against the prior decisions of Missouri. See Moniteau National Bank vs. Miller, 73 Missouri, 187. Which last case was subsequent to the case of Burnett vs. National Bank, 98 U. S., 555, and is indirectly approved in the case of Brown vs. Marion National Bank, 169 U. S., 416.

V.

Said judgment is for 8 per cent interest, when the law of Missouri only provides for 6 per cent when no rate is agreed upon or, as in this case, where the rate is usurious and is forfeited. The Missouri statute is as follows:

"SEC. 3705. When no rate of interest is agreed upon, six per cent. allowed as legal interest."—"Creditors shall be allowed to receive interest at the rate of six per cent per annum, when no other rate is agreed upon, for all moneys after they become due and payable, on written contracts, and on accounts after they become due and demand of payment is made; for money recovered for the use of another, and retained without the owner's knowledge of the receipt, and for all other money due or to become due for the forbearance of payment whereof an express promise to pay interest has been made. (R. S. 1189, § 5972—q.)"

"SEC. 3706. Prrties may agree, in writing, for interest, not exceeding eight per cent.—The parties may agree, in writing, for the payment of interest, not exceeding eight per cent per annum, on money due or to become due upon any contract. (R. S. 1889, § 5973, amended, Laws 1891, p. 169—r.)"

Appellants ask that the judgment in the above entitled case be reversed, and that appellants be permitted to have their just and rightful claims.

BRIEF.

By the National Banking Act, section 5198, revised statutes of the United States, which is the law governing the case of National Banks, there are two provisions, upon the first of which this appeal is bottomed, and provides as follows: "The *taking, receiving, reserving or charging* a rate of interest greater than is allowed by law, when knowingly done, shall be *deemed a forfeiture* of the *entire interest* which the note, bill or other evidence of debt carries

with it, or which has been agreed to be paid thereon."

The Supreme Court of Missouri has construed this clause of said statute in a case on "all fours with this one." See the Monitea National Bank vs. Miller, 73 Mo., 187. The court there, on page 191 and 192 of the decision, says:

"The entire interest which the note carries with it is forfeited" * * "The effect of a stipulation for illegal interest by a National Bank is to deprive it of the right to recover more than the sum lent without interest" * * "The *receiving of illegal interest in furtherance of a stipulation to that effect cannot place the bank upon any better footing.*" "When renewal notes have been given in continuation of the same original loan, the *taint of usury* in the first transaction attaches to all such renewal notes, and when the Bank sues on the last renewal note, the *borrower is entitled to credit for all the interest paid* by him on the loan from the beginning, and not merely by excess above the legal rate."

"Whenever a National Bank charges or stipulates for an illegal rate of interest, all *payments* of interest, and not merely the excess, is illegal."

"*Hence all payments made* are to be *applied* to the *principal*, because the right of the Bank to any interest has been forfeited by the stipulation for usurious interest."

And in the same case, page 194, the Supreme Court further says:

"The statute of limitation has no application." "*This is not a suit by the debtor* to recover back illegal interest paid, but a suit by the Bank to recover usurious and legal interest. The *payments made applied* to the *principal*, etc," in the case at bar would give defendants credit for $540 40 more than given by the court below, and entitle the plaintiff to a judgment of only $1658.95, instead of the $2199.32.

This appears from the report of the referee, to which no ex-

ceptions were taken.

The same doctrine is held in Kansas, in 1895, the Supreme Court in First National Bank of Newton, vs. Turner 42 Pacific Rep. 936, speaking of these sections 5197 and 5198 U. S. Revised Statutes to National Banks, says :—

"You must not charge or receive usury. If you violate this law, and charge or contract for usury, you shall be punished by forfeiting all interest; and if in *addition to charging usury you go further* and actually receive it, the punishment shall be doubled." * * "*Upon the 15th of March, 1886, Turner paid $85.15. This sum must be credited upon the indebtedness of Turner, and not upon usurious interest.*"

The Supreme Court of Pennsylvania, in Guthrie vs. Reid, 107 Pa., St. 251, on page 257, says: "The interest bearing power of the note is destroyed, and when once so destroyed it remains so The taint of usury clings to it until paid. It *is a dead note therefore*, so far as interest is concerned."

And interest paid should be credited on note, not on forfeited interest.

So in National Bank of Auburn vs. Lewis, 73 N. Y. 516, the court says:—

"The moment usurious interest is charged or taken the forfeiture is established. * * The right to set off the usury taken or *to rebate the note to that extent* in this case does not rest upon the same principle as the statute in regard to that subject in this state, *but upon the construction of the Act of Congress.*"

'The entire line or series of notes discounted * * constituted one connected and continuous transaction * * and the taint of usury affects the whole; and when the bank sues upon the last of a series of renewal notes, the forfeiture of the entire interest follows as a necessary result, and *credit must be given for all the interest which has been paid from the beginning of the loan.*"

The U. S. Circuit Court of Indiana, in National Bank of Madison vs. Davis, 6 Central L. J, 106, holds *interest paid may be set off.*

There are numerous authorities to similar effect. That interest being forfeited by the contract for usury in the beginning, the subsequent payments will apply upon the principal which the appellants owe, and not upon an illegal agreement subsequently made without consideration, to apply the payments at renewals of the note to forfeited interest, to which the bank had no legal right. Hence strictly speaking the answer is not a set off, but a crediting of all payments upon a legal instead of an illegal and void demand of the bank.

The loan from the time made through all the renewals being one transaction, and as in the case at bar, it being usurious in its inception, is so throughout. And the interest being by law all forfeited and the note being a dead note, all payments should be applied upon the principal, the only amount which the appellants owed the bank.

The subsequent agreements at renewals, to apply the payments on forfeited interest, were without consideration and void. Hence, when the bank sues, the money had and received by it should be credited upon —the legal demand—the money borrowed

The original loans are admitted to be usurious, and the statute of the United States forfeits all interest on it and its renewals, as they are one and the same thing, being only new evidence of the old debt.

All the interest being forfeited a subsequent contract or agreement between the same parties to pay it is without consideration and void

The subsequent agreements to pay interest on a "*dead note*" being void, the bank has received certain monies which it should apply to what the appellants owe. They owe the original sum borrowed, and when the bank sues the court will apply and credit the partial payments upon the legal demand.

Such is the rule in Missouri in the case of National Bank of Moniteau vs. Miller, 73 Mo. 178, and supported by other authorities.

It is therefore asked that the present judgment be reversed and that the credits be applied upon the debt. And that the remainder beheld to bear only 6 per cent interest or the legal rate of Mo. and no more.

The Appellate Court of Kentucky in the case of

Sydner vs. Sterling Nat. Bank, 21 S. W. Rep. 1050.

Expressly refer to the above Missouri, case in the 73 Mo. 187, and quotes and follows the same.

While the late case of Brown vs. Marion National Bank decided in Feb., 1898, by the U. S. Supreme Court, reported in 18 Vol. Nat. Reports, page 390, refers to the above case of Sydner vs. Sterling National Bank, of Kentucky and expressly sustains it, and reverses a subsequent case decided by the Supreme Court of Kentucky, for not following the law laid down by said Supreme Court in the first decision of Sydner vs. Sterling Nat. Bank.

Thus the case of

Moniteau Nat. Bank vs. Miller in 73 Mo. 187.

On which we rely and which is on all fours exactly in point with this case has been not only followed by Kentucky but expressly approved by the Supreme Court of the United States in its recent decision.

The Kentucky case, Sydner vs. Bank, says: "The bank incorporate in the new notes usurious interest previously charg d as a part of the new principal, and this il'egal consideration pervaded the whole subsequent series of notes. Upon fresh renewal, interest was charged upon *usurious* interest, previously charged as a part of the new principal, and this illegal consideration pervades the whole subsequent series of notes." "Upon fresh renewal interest was charged upon usurious interest which had entered into the prior notes as principal." "The leading idea in these decisions

is that the new notes are mere renewals —new evidence of old debts —and given without new consideration; nor do the new notes operate as a payment of the debts for which they were given, and, as the usury embraced in the old notes taints the entire interest and renders it vicious and void, the agreement to pay it is without a y lawful consideration." * * "THE ENTIRE INTEREST on all the notes should be eliminated, and the judgment rendered for the principal alone, a d the PARTIAL PAYMENTS SHOULD BE APPLIED to the principal." And they say "The case of Bank vs. Miller 73 Mo. 189 decides the same question the same way."

Thus the transaction is treated as though but one note had been given in the beginning containing usurious interest. The same old debt continues and the partial payments from time to time apply on the principal debt, and not on forfeited interest, something that the bank is not entitled to, just the same as though renewal notes had not been given, as renewals were only new evidence of the old debt without any valid consideration.

The Supreme Court of the United States in Brown vs. Marion National Bank, 18 Vol. Supreme Court Rep, (Nat. series) page 390 affirm 169 U. S 416 the same doctrine and reverses a case for not being in harmony with the above case of Sydner vs. Bank in 21 S. W. Rep. 1050, and uses this language:

"It was contended in the Court of Appeals of Kentucky in the present case that its ruling" * * "was different from its subsequent ruling in Sydner vs. Bank." * * "The court conceded that the two cases were not in harmony." "It was the latter view which made it necessary for the appellants to prosecute the present appeal. The judgment in this case did not proceed upon the principal herein stated, in Sydner vs. Bank, but rested upon an erroneous interpretation of the statute, it must be reversed."

We therefore most respectfully submit that this case should be reversed.

JAMES BAKER,
Attorney for Appellants.

No. 63.
Br. of Ridout for D. E.

Office Supreme Court U. S.
FILED
OCT 22 1901
JAMES H. McKENNEY
Clerk

Filed Oct. 22, 1901.

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 63.

S. A. AND S. C. HASELTINE, AND S. I. AND L. K. HASELTINE, PLAINTIFFS IN ERROR,

vs.

THE CENTRAL NATIONAL BANK OF SPRINGFIELD, MISSOURI.

BRIEF FOR DEFENDANT IN ERROR.

JNO. RIDOUT,
Attorney for Defendant in Error.

LAW REPORTER PRINT.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 63.

S. A. AND S. C. HASELTINE, AND S. I. AND L. K. HASELTINE, PLAINTIFFS IN ERROR,

vs.

THE CENTRAL NATIONAL BANK OF SPRINGFIELD, MISSOURI.

BRIEF FOR DEFENDANT IN ERROR.

The principal question in this case is whether usurious interest actually paid on certain notes can be set off in an action brought to recover upon a single note representing the aggregate amount of such smaller notes and which was given in renewal of them. At the time the note sued on was given, $40.65 was deducted or retained from the proceeds of the note in suit. The court below gave judgment for plaintiff for the sum of $2,199, with interest thereon at the rate of 8 per cent *per annum* from the date of the judgment until paid and costs, thus deducting from the face of the note the amount reserved for usurious interest (Rec., pp. 4, 10, 16).

The plaintiffs in error appealed to the Supreme Court of the State of Missouri, by which court the judgment below was affirmed (Rec., p. 18).

The plaintiffs in error thereupon sued out the writ of

error under which the Record has been brought to this court (Rec., p. 1).

Points and Authorities.

It is submitted that the writ of error was not allowed by the proper authority, the allowance appearing to have been made by "Theo. Brace P. Judge Division No. 1, Supreme Court of Missouri." (Rec., p. 1.)

It would seem to have been decided by this court repeatedly that the writ of error must be allowed either by the chief justice of the Supreme Court of a State or by a justice of this court.

If this contention be correct, this court will take notice of the insufficiency of the allowance and dismiss the writ of error.

If, however, the court should be of opinion that the writ of error was properly allowed, then it is submitted that upon the merits, the judgment below should be affirmed for the reasons hereinafter set forth.

The case really involves the construction of section 5198 of the Revised Statutes of the United States.

The assignments of error, which are five in number, raise only two questions. Those numbered from one to four, inclusive, raising the question last above stated, and the fifth, raising the question of the rate of interest, which should have been allowed by the court below.

As to the first question, it is contended that the construction of section 5198 has for a long time been finally settled in this court, the established construction being:

That by said section a new right and a new remedy were created, and that the remedy provided by that section is exclusive of any other.

Barnett *vs.* National Bank, 98 U. S. 558.
Driesbach *vs.* National Bank, 104 U. S. 52.

Stephens *vs.* Monongahela Nat. Bank, 111 U. S. 197.
Carter *vs.* Carusi, 112 U. S. 478.

It follows that under said section 5198 the plaintiffs in error were not entitled to the set offs claimed by them, and were only entitled to the deduction which was actually made.

The plaintiffs in error seek to meet this construction by claiming—

(a) That it is opposed to the laws of the State of Missouri, and the decisions of the Supreme Court of that State.

(b) That the doctrine above stated as the true construction of section 5198 has been overruled by the case of Brown *vs.* Marion National Bank, 169 U. S. 416.

The first contention is completely met by the impregnable reasoning of this court in the case of—

Farmer's National Bank *vs.* Dearing, 91 U. S. 33—

in which case it is clearly shown that not only upon principle and authority, but for the most obvious reasons of public policy, the decisions of this court construing the sections of the National Bank Act must prevail over decisions of the State courts.

The second contention is wholly unsupported by the case cited in support of it.

Brown *vs.* Marion National Bank, *supra*.

In that case the only question before this court under the writ of error and upon the record, was whether the inclusion of concededly usurious interest in the amount of a new note changed the character of the interest so included, made it part of the principal of the note, and protected it against the operation of section 5198.

There is nothing whatever in the language of this court in the case last cited, which in any wise conflicts with the doctrine heretofore established as the true construction of said section 5198.

The case in 169 U. S. furnishes a complete answer to the contention set up by the fifth assignment of error as to the rate of interest upon the judgment, for the opinion in that case expressly states that the right of the defendant is to insist that judgment be given "only for the original principal debt *with interest at the legal rate from the commencement of the suit.*"

In this case the note bore 8 per cent interest, the legal rate in Missouri, when reserved in writing, and the court below only allowed interest at that rate from the date of the judgment.

Even if the court should be of opinion that the rate of interest should be 6 per cent, it would be no ground for reversal, the court having full authority to modify the judgment below.

Upon the whole case, it is respectfully submitted that the judgment below was right and should be affirmed.

JNO. RIDOUT,
Attorney for Defendant in Error.

Supreme Court of the United States.

No. 62.—October Term, 1901.

Seward A. Haseltine et al., Plaintiffs in Error, vs. The Central National Bank. } In error to the Supreme Court of the State of Missouri.

[December 2, 1901.]

This was an action brought originally in the Circuit Court for Greene County, Missouri, by the Haseltines against the Central National Bank, to recover double the amount of certain alleged usurious interest paid by the plaintiffs to defendant, and which they sought to recover under the second clause of R. S. sec. 5198, providing that "in case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same."

The trial court rendered judgment in favor of the plaintiffs for $831.70. From this judgment defendant appealed to the Supreme Court of the State, which reversed the judgment of the trial court upon the ground that the plaintiffs had neither paid nor tendered the principal sum due, and remanded the cause "for further proceedings to be had therein, in conformity with the opinion of this court herein delivered."

Defendant moved to dismiss the writ of error upon the ground that this was not a final judgment.

Mr. Justice Brown delivered the opinion of the Court.

The motion to dismiss must be granted. We have frequently held that a judgment reversing that of the court below, and remanding the case for further proceedings, is not one to which a writ of error will lie. The case of *Mower* v. *Fletcher*, (114 U. S. 127,) is not in point, as the judgment of the Supreme Court of the State remanded that case to the inferior court with an order to enter a specified judgment, nothing being left to the judicial discretion of the court below. A like ruling was made in *Atherton* v. *Fowler*, (91 U. S. 143,) and *Commissioners* v. *Lucas*, (93 U. S. 108.)

While the judgment may dispose of the case as presented, it is impossible to anticipate its ultimate disposition. It may be voluntarily discontinued, or it may happen that the defeated party may amend his pleading by supplying some discovered defect, and go to trial upon new evidence. To determine whether, in a particular case, this may or may not be done, might involve

an examination, not only of the record, but even of the evidence in the court of original jurisdiction, and lead to inquiries with regard to the actual final disposition of the case by the Supreme Court, which it might be difficult to answer. We have, therefore, always made the face of the judgment the test of its finality, and refused to inquire whether, in case of a new trial, the defeated party would stand in a position to make a better case. The plaintiffs in the case under consideration could have secured an immediate review by this court, if the court as a part of its judgment of reversal had ordered the Circuit Court to dismiss their petition, when, under *Mower* v. *Fletcher*, they might have sued out a writ of error at once.

McComb v. *Commissioners*, (91 U. S. 1,) is a case in point. That was a writ of error to the Court of Common Pleas of the State of Ohio. The case had been taken to the Supreme Court of the State, where the judgment of the Common Pleas was reversed for error in sustaining a demurrer to the replies, and overruling that to the answer. Upon suggestion by defendant that he might ask leave to amend his answer, the case was remanded "for further proceedings according to law." Upon the mandate being filed, defendant did not ask leave to amend his answer, but elected to rely upon his defense already made. Thereupon the court gave judgment against him, and he sued out a writ of error from this court. We held that the judgment of the Supreme Court, being one of reversal only, was not final; that so far from putting an end to the litigation, it purposely left it open; that the law of the case upon the pleadings as they stood was settled, but ample power was left in the Common Pleas to permit the parties to make a new case by amendment; that the final judgment was that of the Common Pleas; that "it may have been the necessary result of the decision of the question presented for its determination; but it is none the less, on that account, the act of the Common Pleas," and was, when rendered, open to review by the Supreme Court. The writ was dismissed. A similar case is that of *Great Western Telegraph Co.* v. *Burnham*, (162 U. S. 339.)

This writ of error is therefore dismissed upon the authority of *Brown* v. *Union Bank of Florida*, (4 How. 465;) *Pepper* v. *Dunlap*, (5 How. 51;) *Tracy* v. *Holcombe*, (24 How. 426;) *Moore* v. *Robbins*, (18 Wall. 588;) *St. Clair Co.* v. *Lovingston*, (18 Wall. 628;) *Parcels* v. *Johnson*, (20 Wall. 653;) *Baker* v. *White*, (92 U. S. 176;) *Bostwick* v. *Brinkerhoff*, (106 U. S. 3;) *Johnson* v. *Keith*, (117 U. S. 199.)

Dismissed.

True copy.'

Test:

Clerk Supreme Court, U. S.

Supreme Court of the United States.

No. 63.—October Term, 1901.

Seward A. Haseltine et al., Plaintiffs in Error, vs. The Central National Bank. } In error to the Supreme Court of the State of Missouri.

[December 2, 1901.]

This was an action instituted in the Circuit Court of Greene County, Missouri, by the Central National Bank to recover of the defendants the amount of a promissory note for $2,240, executed June 15, 1896, by two of the defendants as principals and two others as sureties.

The answer was a general denial and a special defense of usury in the original notes, and partial payments, as set up in the several paragraphs of the answer.

The case was referred to a referee, who reported the note sued upon to be a renewal note, and a consolidation of five original notes, the first of which was for $800, given July 27, 1891; the second for $100, of the same date; the third for $500, dated January 24, 1892, and credited by $100 payment thereon; the fourth for $340, dated January 16, 1893, and the fifth and last for $600, dated May 29, 1893.

The referee further found that the defendants had received on this note of $2,240 (or rather out of the notes constituting that note) the sum of $2,199.35 in cash, making the amount reserved out of the note when it was made of $40.65. That there had been paid *cash* discounts upon the several *renewals* of the notes which constituted the $2,240 note sued upon, down to October 24, 1894, exclusive of the amounts reserved out of the notes at the time they were originally given, the sum of $566.70, which cash discounts were paid in advance at the dates of the several renewals. That the whole amount of discounts and interest paid, as well as those deducted by the bank, upon all said loans from the beginning to the end down to and including the note sued on, was $947.50. That these payments were made in excess of the legal rate for said loans.

Upon this report the court entered judgment in favor of the plaintiffs for $2,199.35, (or, apparently, by mistake $2,199,) that being the face of the note sued on after deducting the discount of $40.65, reserved when the note was executed. Upon appeal to the Supreme Court this judgment was affirmed, (155 Mo. 58,) and defendant sued out this writ of error.

Mr. Justice Brown delivered the opinion of the Court.

The only question involved in this case is whether, in an action upon a note given to a national bank, the maker may set off usurious interest

paid in cash upon renewals of such note, and of all others of which it was a consolidation.

In this case, defendants sought to show that they had paid to the plaintiff bank within two years prior to the execution of this note, upon other notes of which this was a consolidation, and also upon this note, usurious interest aggregating $580; which they asked to have deducted from the principal sum of $2,240, represented by this note, thereby reducing the plaintiff's claim to $1,660.

We understand it to be conceded that, as the note in question was given to a national bank, the definition of usury and the penalties affixed thereto must be determined by the National Banking Act and not by the law of the State. (*Farmers &c. National Bank* v. *Dearing*, 91 U. S. 29.) In that case it was held that a law of New York forfeiting the entire debt for usury was superseded by the National Banking law, and that such law was only to be regarded in determining the penalty for usury.

That part of the original National Banking Act which deals with the subject of usury and interest is now embraced in sections 5197 and 5198 of the Revised Statutes, the first one of which authorizes national banks to charge interest "at the rate allowed by the laws of the State," and when no rate is fixed by such laws, a maximum rate of seven per cent. The next section is as follows:

"5198. The taking, receiving, reserving or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back in an action, in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same; provided such action is commenced within two years from the time the usurious transaction occurred."

Two separate and distinct classes of cases are contemplated by this section; *first*, those wherein usurious interest has been taken, received, reserved or charged, in which case there shall be "a forfeiture of the entire interest which the note, bill or other evidence of debt *carries with it*, or which has been *agreed to be paid* thereon;" *second*, in case usurious interest has been *paid*, the person paying it may recover back twice the amount of the interest "thus paid from the association taking or receiving the same."

While the first class refers to interest taken and received, as well as that reserved or charged, the latter part of the clause apparently limits the forfeiture to such interest as the evidence of debt carries with it, or which has been agreed to be paid, in contradistinction to interest actually *paid*, which is covered by the second clause of the section. Carrying this

perfectly obvious distinction in mind, the cases in this court are entirely harmonious.

That of *Brown* v. *Marion National Bank*, (169 U. S. 416,) arose under the *first* clause. The facts are not stated in the report of the case, but referring to the original record, it appears that plaintiff sued the bank to recover twice the amount of certain usurious interest paid to it. Another action was consolidated with this in which plaintiff sought to enjoin defendant from proving certain notes against the estate of which he was assignee, in which a large amount of usurious interest had been included.

In the opinion, a distinction is drawn between usurious interest carried with the evidence of debt or which has been agreed to be paid, and interest which has actually been paid, and it was said that interest included in a renewal note, or evidenced by a separate note, does not thereby cease to be interest within the meaning of section 5198, and become principal; and that, in a suit by a national bank upon the note, the debtor may insist that the entire interest, legal and usurious, included in his written obligation and agreed to be paid, but which has not been actually paid, shall be either credited on the note, or eliminated from it, and judgment given only for the original principal debt with interest at the legal rate from the commencement of the suit; and that the forfeiture declared by the statute is not waived or avoided by giving a separate note for the interest, or by giving a renewal note in which is included the usurious interest. It was further held that interest included in a renewal note is not interest *paid*, since if it were so, the borrower could, under the second clause of the section, sue the lender and recover back twice the amount of the interest thus paid, when he had not, in fact, *paid* the debt nor any part of the interest as such. The words, "in case the greater rate of interest has been paid," in section 5198, refer to interest actually paid as distinguished from interest included in the note and "agreed to be paid."

The cases under the *second* clause of the section are more numerous. *Barnet* v. *National Bank*, (98 U. S. 555,) was an action by a national bank upon a bill of exchange. Defendants set up that the acceptors had been constant borrowers from the bank for several years, and that it had taken from them a large amount of usurious interest; that the bill in suit was the last of eight renewals, and that illegal interest had been taken upon the series to the amount of $1,116, which it was insisted should be applied as a payment upon the bill in question. It was also insisted that illegal interest had been taken upon other bills of exchange to the amount of $6,363.24, and that the defendants were entitled to recover double this amount from the bank. It was *held* that the State statutes upon the subject of usury should be laid out of view, and that where a statute created a new right or offense and provided a specific remedy or punishment, that

remedy alone could apply; that the *payment* of usurious interest being distinctly averred, it could not be recovered by way of offset or payment of the bill in suit, and that the same rule applied to the payment of interest upon other bills of exchange which the defendants sought to recover back.

The case of *Driesbach* v. *National Bank*, (104 U. S. 52,) was a like suit by a bank upon a note, upon several renewals of which usurious interest had been paid. It was said that, as the claim was not for interest stipulated for and included in the note sued on, but for the application of what had been actually *paid* as interest to the discharge of priucipal, there could be no set off against the face of the notes.

In *Stephens* v. *Monongahela Bank*, (111 U. S. 197,)—a similar case of interest actually paid—the averments of the defense were made under the first clause of the section; that "the bank knowingly took, received and charged" usurious interest, but as it elsewhere appeared that the interest stipulated had not been included in the note, but that interest had been actually paid at the time of the discount and renewals, which it was sought to apply to the discharge of the principal, the defense was held insufficient.

The construction of both clauses of this section having been thus settled by this court, it only remains to determine to which class of cases the one under consideration properly belongs. As to this there can be no room for doubt. The referee finds that there was paid cash discounts on the several renewals of the notes which constitute the $2,240 note, as well as the renewal of said note as executed, down to October 24, 1894, exclusive of the amounts reserved out of the notes at the time they were originally given, the sum of $566.70, which cash discounts were paid in advance at the date of the several renewals. He further found that the "defendants in their answer are only asking credit for the payments down to and including October 29, 1894, which aggregate the sum of $540.40." Under the rulings last above cited the person making these cash payments can only recover them back by a direct action against the association taking or receiving the same.

The Supreme Court of Missouri was correct in holding that the defendants could not be allowed set off or credit for the usurious interest thus paid, the remedy provided by the statute being exclusive, and its judgment is therefore

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.